# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1938**

## No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, APPELLANT,

*vs.*

UNITED ARTISTS CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

FILED JUNE 30, 1938.

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[fol. 1] [Caption omitted]

[fol. 2]

**IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA**

No. 3624. In Chancery

UNITED ARTISTS CORPORATION, a Corporation,

v.

FRED L. FOX, Individually and in His Official Capacity as Tax Commissioner of the State of West Virginia

ORDER FILING BILL OF COMPLAINT AND RESTRAINING DEFENDANT—December 17, 1936

This 17th day of December, 1936, came the plaintiff, United Artists Corporation, a corporation, by Brown, Jackson & Knight, its counsel, and tendered and showed unto the Court its verified bill of complaint praying for an injunction restraining the said defendant, Fred L. Fox, individually and as Tax Commissioner of the State of West Virginia, his agents, servants, and employees, from collecting and from attempting to collect from the plaintiff the tax assessed against the plaintiff as set out in the bill of complaint herein, or any penalties claimed to have accrued thereon, and from imposing, levying, or assessing against the plaintiff any tax measured by the income received, or to be received, by the plaintiff for the use of or for the right to exhibit motion picture films owned by it and distributed to exhibitors in West Virginia, as described in said bill of complaint, and from imposing or attempting to impose upon the plaintiff any interest or penalty on account of the failure of the plaintiff to pay any such tax, and from enforcing or attempting to enforce any penalty against the plaintiff for the non-payment of, or failure to make a return for the purpose of, any such tax.

And the said bill of complaint is ordered to be and the same is hereby filed.

And the plaintiff, by its said counsel, applied to and moved the Court for an interlocutory injunction enjoining and restraining the defendant according to the prayer of

plaintiff's bill of complaint as hereinbefore set out, and [fol. 3] also applied to and moved the Court for a temporary restraining order enjoining and restraining the defendant as aforesaid pending the action of the Court upon said application and motion for an interlocutory injunction.

And the plaintiff showed unto the Court that proper service of notice of said applications and motions has been had upon the defendant and upon the Attorney General and upon the Governor of the State of West Virginia, and tendered said notice with the returns thereon, and the same is ordered filed.

And the said defendant in person, and the Attorney General of West Virginia for said defendant and for the Governor of said State appeared and resisted the granting of the said applications and motions.

And it appearing to the Court, upon consideration of the said bill of complaint and argument of counsel for the respective parties, that the issuance of a temporary restraining order is necessary in order to prevent immediate and irreparable loss and damage to the plaintiff,

It is Adjudged, Ordered and Decreed, that the said defendant, Fred L. Fox, individually and as Tax Commissioner of the State of West Virginia, his agents, servants, and employees, be, and they are, and each of them is, hereby restrained and enjoined from collecting and from attempting to collect from the plaintiff the tax assessed against the plaintiff as set out in the bill of complaint herein, or any penalties claimed to have accrued thereon, and from imposing, levying, or assessing against the plaintiff any tax measured by the income received, or to be received by the plaintiff for the use of or for the right to exhibit motion picture films owned by it and distributed to exhibitors in West Virginia, as described in said bill of complaint, and from imposing or attempting to impose upon the plaintiff any inter- [fol. 4] est or penalty on account of the failure of the plaintiff to pay any such tax, and from enforcing or attempting to enforce any penalty against the plaintiff for the non-payment of, or failure to make a return for the purpose of, any such tax, until the hearing of the plaintiff's application and motion for an interlocutory injunction herein, and until the further order of the Court; provided that the plaintiff do forthwith give and file in this cause a surety bond in the sum of $5,000.00, with security to be approved by the Clerk

of this Court, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby, and such bond was thereupon given in open Court.

And it appearing to the Court that said bill of complaint and the application and motion of the plaintiff hereinbefore set forth seek an interlocutory injunction restraining the enforcement, operation and execution of a statute of the State of West Virginia as against the plaintiff by restraining the Tax Commissioner of said State in the enforcement or execution of such statute as against the plaintiff upon the ground of the unconstitutionality of said statute as applied to the plaintiff and its business, the Court is of opinion that there should be called to the assistance of the Judge of this Court two other Judges to hear and determine said application and motion for an interlocutory injunction pursuant to Section 266 of the Judicial Code, and it further appearing that two other Judges cannot now be conveniently called for the purpose the Court doth reserve until a future date the entry of an order setting the said application and motion for hearing.

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[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed December 17, 1936

To the Honorable George W. McClintic, Judge of Said Court:

The plaintiff avers and says that:

I

Plaintiff is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office and chief place of business located in the City of New York in the State of New York and as such is a citizen and resident of the State of Delaware.

II

The defendant Fred L. Fox is now and was at all times hereinafter mentioned the Tax Commissioner of the State

of West Virginia, a citizen and resident of the City of Charleston, Kanawha County, West Virginia, and of the Southern District of West Virginia, and as said Tax Commissioner is charged with the duty of collecting taxes for the State of West Virginia and administering and enforcing the tax laws of the State of West Virginia.

III

This is a suit of a civil nature in equity, the controversy involved therein is wholly between citizens of different states, and the amount in controversy therein exceeds $3,000.00, exclusive of interest and costs.

IV

The plaintiff is engaged in the business of distributing motion pictures from its place of business in the State of New York to exhibitors of motion pictures in practically [fol. 6] every State of the United States, including the State of West Virginia. The Plaintiff has no place of business, office, agents, or employees in West Virginia, and owns no property in West Virginia other than such of its films as are temporarily within West Virginia, as hereinafter more fully set out. The plaintiff maintains branch offices in certain cities in the United States, including the cities of Cincinnati in the State of Ohio, Pittsburgh in the State of Pennsylvania, and Washington in the District of Columbia, but no office of any kind is maintained in the State of West Virginia. The method of doing business the plaintiff and West Virginia exhibitors is as follows: The plaintiff makes public announcement from time to time of motion pictures that it has or will have for release. Theatre owners or managers who desire to exhibit motion pictures that the plaintiff has or expects to have for distribution make written application in the form of an offer to the plaintiff at its place of business in New York, usually through the representatives of one of the three branches above named, for a certain picture or for a number of certain pictures or for a number of pictures to be selected by the exhibitor. The plaintiff, through its proper officers or representatives at its main office in the City of New York, rejects or accepts such application and offer. When such application and offer is accepted a contract is made by executing upon said application and offer an acceptance thereof in the State of New York and return-

ing said contract composed of the application and offer and said acceptance to the said exhibitor. Such contract provides that the motion picture films therein specified or to be selected as therein provided for will at the time or times specified or provided for be sent by the plaintiff to the exhibitor, who is by the contract authorized to exhibit such films for a number of days fixed by the contract, which period of time is usually for one day or for seven days or for some intermediate number of days. The contract provides that the exhibitor will pay the plaintiff for the right to ex- [fol. 7] hibit such films, which payment is sometimes fixed by the contract as a specified sum of money and sometimes as a specified percentage of the receipts from theatre admissions during the day or days when said picture is exhibited. The contract further provides that the exhibitor at the end of such period will ship said film or films by a carrier designated or used by plaintiff, to some other exhibitor, who is usually outside of the State of West Virginia, or to the said Cincinnati office of the plaintiff, or to the Pittsburgh or Washington office of the plaintiff, whichever shipped the film to the exhibitor, such shipment in any event to be at the direction of the plaintiff, and such films are always finally returned to the plaintiff in New York or at some point without the State of West Virginia. Pursuant to said contract the plaintiff sends the films from one of said branch offices without the State of West Virginia by express or parcel post or other carrier to the exhibitor in West Virginia. Such exhibitor then exhibits such films in ordinary motion picture theatres, and charges an admission fee to such of the public as desire to see such exhibition. When the use of the pictures is completed according to the contract they are reshipped on advices given by the plaintiff. Usually said contracts are sent by the New York office of the plaintiff to its said Cincinnati or Washington, D. C., or Pittsburgh office, and by said office to West Virginia exhibitors. There are a large number of exhibitors of plaintiff's films in the cities and towns of West Virginia, such films being exhibited in nearly all the counties in said State. All prints and films of the motion pictures licensed for exhibition by exhibitors in West Virginia are manufactured and made in laboratories in the State of California, and all of such prints and films are sent from California to Cincinnati, Pittsburgh, and Washington and thence to exhibitors in West Virginia. Al-

ways the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the [fol. 8] films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff without the State. A true copy of a typical contract such as is hereinbefore described is attached hereto, marked for identification "Exhibit A With Bill of Complaint".

V

By Article 13 of Chapter 11 of the West Virginia Code of 1932, as amended and in effect from March 9, 1935, said Article dealing with the Business and Occupation Tax of West Virginia, it is provided that (Section 2-(h)) a tax equal to one per cent of gross income is levied upon and shall be collected from every person engaging or continuing within the State in any service business or calling not otherwise specifically taxed under said law: that (Section 2-(i)) upon every person engaging or continuing within the State of West Virginia in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance, or otherwise, and whether the return be in the form of rentals, royalties, fees, interest, or otherwise, the tax shall be one per cent of the gross income of any such activity; that (Section 4) taxes levied under said Article 13 shall be payable in quarterly installments on or before the expiration of thirty days from the end of the quarter in which they accrue, and the taxpayer shall within thirty days from the expiration of each quarter make out an estimate of the tax for which he is liable for such quarter, verify the same by oath and mail the same, together with a remittance in the form required, to the office of the defendant; that (Section 5) on or before thirty days after the end of the tax year each person liable for the payment of any such tax shall make a return showing the gross proceeds of sales or gross income of business, compute the amount of tax chargeable against him in accordance with the provisions of said Article, deduct the amount of quarterly payments, if any, and transmit with his report a remittance in [fol. 9] the required form covering the residue of the tax chargeable against him to the defendant.

Said Article further provides that (Section 7) if any person fail or refuse to make return, or if the Tax Commissioner has reasonable ground to believe that any return made is so deficient as not to form the basis of a satisfactory assessment of tax, the Tax Commissioner may proceed as he deems best to obtain information on which to base the assessment of the tax, shall assess the tax and notify the person assessed of the amount of the tax; and the assessment of the tax by the Tax Commissioner shall be final as to any person who refused to make a return.

Said Article further provides that (Section 8) any person, having made the return and paid the tax as provided therein, who feels aggrieved by the assessment made upon him, may apply to the Board of Public Works within thirty days after notice is mailed to him by the Tax Commissioner for a hearing and correction of the amount of the tax so assessed against him, said Board may grant or deny such hearing, and upon a hearing, if granted, may make such order as shall appear to it just and lawful; any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the Tax Commissioner, and the Circuit Court of the County in which the taxpayer resides or is located shall have original jurisdiction of any such action and shall adjudge costs to such extent and in such manner as may be deemed equitable, and upon presentation of a certified copy of a judgment in any such action the Auditor of the State of West Virginia shall issue his warrant upon any funds in the State Treasury available for the payment thereof; no injunction shall be awarded to restrain the collection of taxes imposed thereby except upon the ground that the assessment thereof was in violation of the Constitution of the United States or the Constitution of the State of West Virginia, or that the same [fol. 10] were fraudulently assessed, or that there was a mistake made in the amount of taxes assessed upon such person, and in the latter case the bill must show an application to the Board of Public Works for the correction of the assessment and the payment into the treasury of all taxes appearing by the bill of complaint to be owing.

Said Article further provides that (Section 9) the assessment of taxes and the returns required shall be for the year ending on the 31st day of December, but if a taxpayer

keeps books reflecting his business on a basis other than the calendar year, he may, with the assent of the Tax Commissioner, make annual returns and pay taxes for the year covering his accounting period; that (Section 11) all remittances of taxes imposed thereby shall be made to the Tax Commissioner and he shall pay the moneys into the state treasury to be kept and accounted for as provided by law; that (Section 12) a tax due and unpaid thereunder shall be a debt due the State and a lien upon the property used in the business or occupation upon which it is imposed, such lien shall have the same priority as the lien of the general property tax, a penalty of five per cent shall be added for any default for thirty days or less, and for each succeeding thirty days of such default there shall be added an additional penalty of one per cent; that (Section 13) the Tax Commissioner may collect taxes due and unpaid thereunder, together with all accrued penalties, by an action in assumpsit, motion for judgment, or other appropriate proceeding in the Circuit Court of the County in which the privilege taxed has been exercised; and in the event of default in payment of the tax for sixty days after the same shall be due, the Tax Commissioner may proceed in the Circuit Court of the County in which the privilege taxed has been exercised to obtain an injunction restraining the further exercise of the privilege until full payment of all taxes and penalties due under said Article; that (Section 20) the Tax Commissioner may distrain upon any goods, [fol. 11] chattels, or intangibles represented by negotiable evidences of indebtedness of any tax payer delinquent under said Article for the amount of all taxes and penalties accrued and unpaid thereunder, and he is authorized to require the assistance of the sheriff of any County of the State in levying such distress in the County of which such sheriff is an officer.

Said Article further provides that (Section 21) it shall be unlawful, under penalty of a fine not exceeding one thousand dollars and imprisonment not exceeding one year, for any person to refuse to make the return provided for therein, or make any false or fraudulent return or false statement in any return with intent to defraud the State or to evade the payment of the tax or any part thereof imposed thereby, or for any person to aid or abet another in any attempt to evade the payment of such tax, or for an officer of any corporation to make or permit to be made for any cor-

poration any false return or false statement in any return required thereby, with intent to evade the payment of any tax thereunder.

Chapter 1 of the Acts of the Extraordinary Session of the Legislature of West Virginia, effective July 1, 1925, imposed (Section 2-(g)) a tax of three-tenths of one per cent of the gross income of any business not included in businesses enumerated in the statute, and this provision became Section 2-(g) of said Article 13 of Chapter 11 of the West Virginia Code of 1932, and pursuant to amendment made by Chapter 33 of the Acts of the Legislature of 1933, effective May 26, 1933, the substance of said provision became Section 2-(h) of said Article 13 as now in effect, with an increase of the tax imposed to one per cent of the gross income of any such business. And under each such statute or provision of the Code an assessment of tax by the Tax Commissioner was final, as to any person who had failed or refused to make a return for the purposes of the tax. And plaintiff is advised that the defendant claims the right to impose taxes upon the plaintiff under the said provisions [fol. 12] of the said statute of 1925, and under the provision of said Section 2-(h) of said Article 13 of Chapter 11 of said Code as well as under the provisions of said Section 2-(i) of said Article 13.

VI

Plaintiff, having been advised that by reason of the facts hereinbefore set forth it is not liable to the payment of the tax, imposed by the provisions of the West Virginia Code of 1932 as amended and now in effect, upon persons engaging or continuing within said State in the business of collecting incomes from the use of real or personal property, or of any interest therein, and having also been advised that it was not liable to the payment of any tax imposed by any previous statute upon persons engaging in business of any kind within said state, plaintiff has never made any of the estimates, reports or returns required by said Code of West Virginia, as amended and now in effect, or by any previous statute to be made by persons engaged in business in West Virginia. Nevertheless, acting under color of the provisions of said Code hereinbefore mentioned, and it may be under color of the provisions of said Act of 1925, the defendant as the Tax Commissioner of West Virginia claims

the right to collect a tax of one per cent of the gross proceeds of all amounts collected and received by the plaintiff from motion picture exhibitions in West Virginia, whether such amounts so collected are in the form of fixed charges or in the form of percentages, and has wrongly and unlawfully made an assessment of such tax against the plaintiff amounting to $4,402.19 as of October 1, 1936. Said assessment was made without notice to plaintiff and without a hearing and plaintiff is not advised upon what information defendant made such assessment nor the period for which the said tax was assessed. Pursuant to such claim the defendant has demanded that plaintiff pay to him the said sum as a tax which he alleges has already accrued as aforesaid and further that the plaintiff pay said tax upon all such sums as it may receive in West Virginia from exhibi- [fol. 13] tors of its films after October 1, 1936, and the defendant threatens to, and unless restrained as hereinafter prayed, will, assess further taxes against the plaintiff upon such income received by it subsequent to October 1, 1936. And the defendant has threatened and now threatens to undertake to enforce the collection of the amount of the tax unlawfully assessed as aforesaid with all accrued penalties and those to accrue, and for the purpose to bring against the plaintiff actions at law in the counties, or some of them, in which plaintiff's films have been and from time to time are being shown, and in such actions to sue out attachments and to make the exhibitors of plaintiff's films garnishees thereunder, and to distrain plaintiff's films in the possession from time to time of exhibitors in the State of West Virginia, and if plaintiff shall refuse for sixty days to pay the amount of the tax unlawfully assessed as aforesaid to institute a suit or suits in chancery in the Circuit Courts of the Counties in which the plaintiff's films have been and from time to time are being shown, or in some of them, for an injunction to restrain the further showing of such films until full payment shall have been made of all taxes and penalties claimed by the defendant to be due as aforesaid. And the defendant threatens to repeat and continue such suits and attachments until he has collected from the plaintiff all such sums as he claims to be now due as aforesaid and as he may hereafter claim to be due by reason of any taxes hereafter assessed against the plaintiff under

color of law as aforesaid. And the said defendant has advised certain of the exhibitors to whom the plaintiff distributes films in West Virginia of his said intentions and threatens to harass and annoy, and to continue harassing and annoying, such exhibitors by the service of notices of garnishment upon them, by seizing under distraint films in their hands from time to time and by enjoining the showing of plaintiff's films by such exhibitors until the plaintiff has paid the said taxes heretofore unlawfully assessed and any taxes against the plaintiff which said Tax Commissioner may hereafter assess under color of law as afore- [fol. 14] said. The sums of money due the plaintiff from time to time from the respective exhibitors in the State of West Virginia are such that to collect the tax heretofore unlawfully assessed and now claimed to be due as aforesaid, it will be necessary to levy successive attachments and serve notice of garnishment, or to levy successive distraint warrants, upon the same exhibitor, or to levy such attachments and serve such notices or levy such distraint warrants upon a large number of said exhibitors, and that the considerable number of attachments or distraints necessary for the collection of the amount of said tax heretofore unlawfully assessed, payment of which is now demanded, and of the said taxes which may hereafter be assessed and payment thereof demanded, will result in a multiplicity of suits. The defendant's threats to sue out such attachments, levy such distraints and seek such injunctions have annoyed and harassed, and will continue to annoy and harass, the exhibitors to whom the plaintiff distributes its films; and the garnisheeing of exhibitors, to whom plaintiff has distributed its films and the seizure under attachment or distraint of said films in the possession of exhibitors will further annoy and harass such exhibitors; all of which will tend to induce such exhibitors to turn to other distributors for films to exhibit. And plaintiff is informed, believes, and avers that the defendant will continue such threats and take such actions and proceedings to enforce payment of the said tax unlawfully assessed and other taxes to be likewise unlawfully assessed, together with the penalties accrued and to accrue, unless restrained and enjoined as hereinafter prayed, all to the immediate and irreparable damage and injury of the plaintiff and its business.

VII

Under the provisions of Section 7 of Article 13 of Chapter 11 of the said Code and under the previous statutes hereinbefore mentioned the assessment made by the defendant against the plaintiff as aforesaid is final, and there is no administrative procedure whereby the plaintiff may seek to have the assessment corrected or annulled. And [fol. 15] the plaintiff has no adequate remedy at law for its protection or redress in the premises, since the action or suit which Section 8 of said Article 13 provides may be brought against the Tax Commissioner to recover taxes improperly charged and paid is in fact a suit against the State, must be brought in a Circuit Court of the State of West Virginia, and may not be brought in a District Court of the United States, nor without paying the amount of the tax unlawfully assessed before instituting such action.

VIII

(a) The plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance, or otherwise, and has never been and is not now engaged in any business in the State of West Virginia, all of its business having been conducted wholly without said State of West Virginia, as hereinbefore set out.

(b) The business and activities of the plaintiff upon which the defendant is attempting to levy a tax are conducted solely in interstate commerce. The tax sought to be levied and imposed as aforesaid constitutes and is an undue burden and hindrance upon interstate commerce, in violation of the Constitution of the United States. In so far as said Article 13 and the previous statutes hereinbefore mentioned profess or undertake to impose a tax computed upon income of the plaintiff derived as aforesaid, they constitute, and each of them constitutes and causes, an unlawful exaction on income derived from interstate commerce and imposes an undue burden and hindrance upon interstate commerce in violation of the Constitution of the United States, and are particularly contrary and repugnant to Section 8 of Article I thereof, and to that extent the said laws are and each of them is void. And the said claims, demands, assessments, and threatened acts of

the defendant likewise constitute a like burden upon interstate commerce.

[fol. 16] (c) The provisions of Article 13 of Chapter 11 of the said Code of West Virginia as amended and now in effect and of the previous statutes hereinbefore referred to, denying to plaintiff any remedy or right of redress against the tax assessment unlawfully made by the defendant as aforesaid, except upon the payment of such assessment and the institution of an action or suit in a Circuit Court of the State of West Virginia against the Tax Commissioner as a nominal defendant, but in reality against the State of West Virginia, and which cannot be brought in a court of the United States, would deprive the plaintiff of its property without due process of law and deny to it the equal protection of the laws in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Wherefore, inasmuch as the plaintiff is without adequate remedy save in a court of equity, the plaintiff prays:

1. That the defendant, Fred L. Fox, individually and as Tax Commissioner of the State of West Virginia, his agents, servants, and employees be restrained and enjoined from collecting and from attempting to collect from the plaintiff the tax assessed against the plaintiff as hereinbefore set forth and any penalties claimed to have accrued or hereafter to accrue thereon; from imposing, levying, or assessing against the plaintiff any tax measured by the income received, or to be received, by the plaintiff for the use of or for the right to exhibit motion picture films owned by the plaintiff and distributed to exhibitors in West Virginia, as hereinbefore set forth, under and pursuant to Article 13 of Chapter 11 of the West Virginia Code of 1932 as amended and now in effect or under any previous statute of West Virginia imposing a tax upon the privilege of doing business in West Virginia; from imposing or attempting to impose upon the plaintiff any interest or penalty on account of the failure of the plaintiff to pay any such tax; and from hereafter enforcing or attempting to enforce any penalty against [fol. 17] the plaintiff for the non-payment of, or failure to make a return for the purpose of, said tax.

2. That a preliminary injunction be granted to the plaintiff restraining and enjoining the defendant as hereinbefore prayed until the final hearing of this case, or the further

order of the Court herein, and that a temporary restraining order may be granted pending the hearing of plaintiff's motion for such preliminary injunction.

3. That the plaintiff may have such other, further, and general relief as plaintiff's case may require and the Court may see fit to grant.

United Artists Corporation, a Corporation, by Counsel. R. G. Kelly, E. W. Knight, Brown, Jackson & Knight, Solicitors.

*Duly sworn to by R. G. Kelly. Jurat omitted in printing.*

(Here follow two photolithographs, side folios 18 and 19)

EXHIBIT A WITH BILL OF COMPLAINT

Form 220A—12-35-U



EXHIBITOR'S COPY Made in U.S.A.

# United Artists Corporation

## CONTRACT

for

## ONE SINGLE FEATURE MOTION PICTURE

Exchange .....

Salesman .....

Cont. No. .....

Dated .....

Form 41 No. .....

SIXTEENTH: The following SCHEDULE and all the written and printed parts thereof are a part of this license:

1. Picture .....
2. Star or Producer .....
3. Theatre .....
4. Exhibitor .....
5. Town .....
6. Zone ..... 7. Run .....
8. Consecutive Dates or Days .....
9. Clearance .....

.....

10. The Exhibitor agrees to pay as a license fee either A, B or C—

A.—Flat rental $.....

B.—Guarantee and Percentage $.....

C.—Percentage .....

And Sound Recording Fees $.....

The Exhibitor agrees to adhere, in its newspaper advertising and publicity, to the instructions issued to the Exhibitor by the United Artists Corporation.

Exhibitor agrees to charge as minimum admission to theatre—

Matinee. Adults .....Children.....

After 5 P.M. " ..... " .....

12. Special Arrangements.

WAIVER—
SEVENTEENTH: A waiver by either party of any breach or default of the other party shall not be construed as a waiver of any other or subsequent breach or default of such other party.

VERBAL PROMISES; CHANGES MUST BE IN WRITING—
EIGHTEENTH: This license agreement is complete, and all promises, representations, understandings and agreements in reference thereto have been expressed herein. No change, modification or assignment hereof shall be binding upon the distributor unless in writing signed by an officer or any person duly authorized by the Distributor in its main office in New York City.

The right of the Distributor to approve or reject this application or any other application signed by the Exhibitor at the same time or at any other time is not dependent upon the approval or rejection by the Distributor of this application or of any other application.

IN WITNESS WHEREOF, the Exhibitor has on the.....day of.....19 , executed this application, which upon acceptance by the Distributor at his home office in New York ..... signature of the proper officers shall constitute a contract of license for the exhibition of the motion picture specified in the schedule, but

**WAIVER—**
**SEVENTEENTH:** A waiver by either party of any breach or default by the other party shall not be construed as a waiver of any other or subsequent breach or default of such other party.

**VERBAL PROMISES; CHANGES MUST BE IN WRITING—**
**EIGHTEENTH:** This license agreement is complete, and all promises, representations, understandings and agreements in reference thereto have been expressed herein. No change, modification or assignment hereof shall be binding upon the distributor unless in writing signed by an officer or any person duly authorized by the Distributor in its main office in New York City.
The right of the Distributor to approve or reject this application or any other application signed by the Exhibitor at the same time or at any other time is not dependent upon the approval or rejection by the Distributor of this application or of any other application.

IN WITNESS WHEREOF, the Exhibitor has on the.....day of.....19 , executed this application, which upon acceptance by the Distributor at his home office in New York City by its affixing hereto the facsimile or perforated or written signature of the proper officers, shall constitute a contract of license for the exhibition of the motion picture specified in the schedule, but only at the theatre and on the dates specified herein and in accordance with the terms and conditions hereof.

Dated the.....day of

.....19 8....

ACCEPTED at New York, N. Y.

UNITED ARTISTS CORPORATION

By.....
General Manager of Distribution

Exhibitor .....L.S.
An Individual—A Partnership—A Corporation
(Strike out two)

Lessee
Owner (Strike out two)
Operator

By .....
Partner—General Manager—Officer
(Strike out two)

Guaranteed By

.....

**END OF CONTRACT.**

BEGINNING OF THE

# CONTRACT OF LICENSE

**Upon the acceptance by the distributor at its home office in New York City the following shall constitute the contract of license.**

**LICENSE—**
FIRST: The DISTRIBUTOR grants and the EXHIBITOR accepts a limited license under the **copyright** of the motion picture specified in the schedule and a license for use of the sound recorded therewith to exhibit publicly said motion picture and to reproduce publicly such recorded sound in synchronism therewith by use of the positive print delivered to the Exhibitor by the Distributor on the dates set in accordance with the terms hereof and specified or confirmed by the Distributor in writing. Said license does not include exhibition prior to 8 a. m. of the first date of exhibition.

**MUSIC—**
SECOND: If copyrighted musical compositions are included in such recorded sound, the exhibitor warrants to have at the date of exhibition a license to perform publicly such music from the copyright proprietor thereof.

**PAYMENT—**
THIRD. (a) The Exhibitor agrees to pay to the Distributor the license fee in the Schedule set forth at least 7 days in advance of the fixed day of the exhibition as such days are fixed in the Schedule or in accordance with ARTICLE SEVENTH hereof. **Any and all payments to be made hereunder shall be payable to the Distributor at the city in which is located the Exchange from which the Exhibitor is served.**

**PAYMENT UPON PERCENTAGE BASIS—TRUST FUNDS**
(b) If any part of the license fee of said motion picture shall be computed upon the exhibitor's gross receipts, such payment or part thereof shall be made to the distributor at the end of each days exhibition together with a correct itemized statement of the gross receipts of said theatre for admission thereto upon the exhibition date or dates of said motion picture for which payment is so required to be made, signed by the Exhibitor or the Exhibitor's Manager and the Exhibitor's cashier or treasurer. Should the distributor so require, such itemized statement shall be made upon forms furnished by the distributor. Upon said date or dates an authorized representative of the distributor is hereby given the right to verify the sale of all tickets of admission to said theatre, and the receipts therefrom, and for such purpose shall have access to the theatre, including the box office, and also the right to examine the exhibitor's books and records relating to such gross receipts. The distributor, or its authorized representative, also shall have access for a period of one (1) year after the receipt by the distributor of each final box office statement, to all of the exhibitor's books and records for the purpose of verifying such box office statement. The distributor agrees that any information obtained pursuant to the provisions of this Clause will be treated as confidential, excepting in any arbitration proceeding, or litigation in respect to this license. The Exhibitor further agrees to segregate the Distributor's share of the gross receipts as such admission moneys are paid into the box office and not to intermingle such funds with any other moneys and to hold such percentage share of such gross receipts in trust for the Distributor and to pay over such trust funds daily as in this paragraph provided, it being intended that the Distributor's share of the gross receipts shall be exclusively the property of the Distributor from the moment it is paid into the box office.

**LIQUIDATED DAMAGES FOR BREACH—**
FOURTH: **1. If Licensed Upon a Flat Fee.** The Exhibitor recognizes and agrees that the damage suffered by the distributor, if the exhibitor fails to exhibit and/or pay for the aforesaid motion picture is the license fee specified in the schedule above.
**2. If Licensed Upon a Percentage Basis.** If payment hereunder of the license fee of said motion picture shall be computed either in whole or in part, upon a percentage of the gross admission receipts of said theatre, and if the Exhibitor fails or refuses to exhibit such motion picture as herein provided, the Exhibitor shall pay to the Distributor as liquidated damages for each day that the Exhibitor fails or refuses to exhibit such motion picture, a sum equal to such percentage of the average daily gross receipts in such theatre during the period of thirty (30) operating days to wit, the sixteen (16) operating days immediately prior to and the fourteen (14) days immediately after but including the date of the mailing of the notice of availability as set forth in ARTICLE SEVENTH Subdivision (2) and in addition any fixed sums payable hereunder in respect thereto. If the Exhibitor shall exhibit such motion picture for less than the full number of days provided for in this license the sum equal to such percentage shall be computed, upon a sum equal to seventy-five per cent (75%) of the gross receipts of said theatre during the last day of the exhibition thereat of such motion picture. A sworn statement of the said daily gross receipts shall be delivered by the Exhibitor to the Distributor upon demand therefor.

**DELIVERY OF PRINTS—**
FIFTH: (1) The Distributor shall deliver a print of 2,000-foot reels or less in length to be at the option of the Distributor in physical condition for the exhibition contemplated herein.
(2) Delivery to the Exhibitor or the Exhibitor's authorized agent by delivery at the Distributor's Exchange, or to a common carrier, or to the United States Postal authorities, shall constitute delivery for all purposes under the terms of this agreement. Any delivery to a carrier shall be made in accordance with the carrier's delivery schedule in time to reach the place where the said theatre is located at least one hour before the usual time for the opening of said theatre.

**ROAD SHOW—**
SIXTH: A road show is solely under the control of the producer and is not a general release and the producer does not deliver the picture to the distributor for general release until the completion of any such road shows. Thus said motion picture will become available to the Distributor for distribution only upon the completion of any such road show. However, the Distributor agrees that should the motion picture be "road shown" in the immediate vicinity of the Exhibitor's theatre, in the same zone, as that word is understood in motion picture parlance, this contract for the exhibition of said motion picture may, at the option of either party, be cancelled by written notice given to the other party within 15 days after the commencement date of such roadshow. Otherwise this agreement remains in full force and effect.

**FIXING EXHIBITION DATES—**
SEVENTH: The exhibition date or dates of such motion picture, unless definitely specified or otherwise provided for in the Schedule, or otherwise agreed upon in writing, shall be as follows:
(1) This contract contemplates the general release of the said picture within the eighteen (18) months next succeeding the date of the execution of this contract. Should the producer not deliver the picture to the distributor, therefore, so that the distributor can generally release it by that date, this contract of license shall be mutually cancelled on that date.
(2) Within a reasonable time after the delivery by the producer, and provided the exhibitor is not in default hereunder, or under any other contract with the distributor, the distributor agrees to mail to the exhibitor a notice in writing of the date when such motion picture will be available for exhibition by the Exhibitor, such date being hereinafter referred to as the available date. Such notice shall be mailed to the exhibitor at least fifteen days prior to the available date therein specified.
(3) The Exhibitor shall, within fourteen days after the mailing of such notice, select the exhibition date or dates, such dates to be within the period commencing with the available date and ending thirty days thereafter, by giving to the Distributor written notice of the date or dates so selected. If the exhibition date or dates so selected by the Exhibitor are not open to the Exhibitor, the Distributor shall so notify the Exhibitor, and in such event the exhibition date or dates shall be as provided in the following paragraphs (a) and (b):

EXHIBIT A WITH BILL OF COMPLAINT

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CONTINUED ON PAGE 2

(a) If other dates within the same period are open, the Distributor shall notify the Exhibitor thereof, and the Exhibitor agrees immediately to select from such open dates another date or dates. Should the Exhibitor fail so to do, the Distributor may, at its option, either declare the contract to be in default, or designate in writing such date or dates within the period beginning not earlier than two weeks and ending not later than six weeks from the date first selected by the Exhibitor, and written notice thereof shall be given or mailed to the Exhibitor fourteen days before the date so designated by the Distributor. The Exhibitor must immediately confirm such dates to the Distributor, and should the Exhibitor not confirm the date so designated, the Exhibitor shall be in default under this contract.

(b) If no other dates within the said thirty days are open, then the Exhibitor shall designate the date or dates which shall be within the period beginning not earlier than two weeks, and ending not later than six weeks from the last day of the said thirty days, and written notice thereof shall immediately be given or mailed to the Distributor by the Exhibitor. If the Exhibitor fails to so designate such date or dates, then the Distributor may, at its option, either declare the contract to be in default, or designate in writing such date or dates within the period beginning not earlier than two weeks and ending not later than six weeks from the date first selected by the Exhibitor, and written notice thereof shall be given or mailed to the Exhibitor fourteen days before the date so designated by the Distributor. The Exhibitor must immediately confirm such dates to the Distributor, and should the Exhibitor not confirm the date so designated, the Exhibitor shall be in default under this contract.

**(4) In the event of the Exhibitor failing to designate exhibition date or dates of such motion picture as in this contract provided, or should the Exhibitor default in any other contract he has with the Distributor, then and thereupon any sum or sums of money and other fixed consideration shall become due and payable by the Exhibitor to the Distributor, anything to the contrary in this contract notwithstanding, and the clearance period in respect to such motion picture provided in this agreement, shall be deemed revoked; and if payment hereunder of the license fee of said motion picture is to be computed in whole or in part upon percentage of the gross admission receipts of said theatre, damages shall be computed as agreed upon in paragraph Fourth, subdivision (2), from the last day of the fourteen days after the mailing of the notice of availability as set forth in paragraph Seventh, subdivision (2) above.**

(5) The date or dates fixed or determined as in this Article provided shall be for all purposes the exhibition date or dates of such motion picture as though set forth in the Schedule before execution hereof by the Exhibitor.

**(6) The exhibitor is cognizant that the Distributor is bound by contract to cause the motion pictures distributed by it to be exhibited in the several exchange territories in sequence of the general release of such pictures in each respective exchange territory. Therefore, pursuant thereto, the Exhibitor agrees to exhibit each motion picture for the license of which it contracts with the Distributor in the sequence of the notices of availability given the Exhibitor by the Distributor, and that this order of exhibition shall be of the essence of this and the other license agreements entered into by the parties hereto.**

**RETURN OF PRINTS BY EXHIBITOR—**

EIGHTH: (a) After the last exhibition on the last date of the period of this license, the Exhibitor agrees promptly as instructed in writing by the Distributor, either to return such prints to the Distributors' Exchange, or to deliver the same to a carrier designated by the Distributor, or to deliver such print to another exhibitor, and in any case to pay all transportation charges therefor adequately valued and insured.

(b) In the event the Exhibitor is obligated by such written instructions to deliver said print to another exhibitor, and fails so to do, and the Distributor is damaged thereby, the Exhibitor agrees to pay any and all such damages.

**LOSS OF OR DAMAGE TO PRINTS—**

NINTH: (a) The Exhibitor shall immediately notify the Distributors' Exchange by telegram of the loss, theft or destruction of or damage to any print between the delivery to and the return thereof by the Exhibitor, and in such event, the Exhibitor agrees to pay to the Distributor a sum equal to the cost of replacement for each lineal foot thereof.

(b) The Exhibitor agrees that all claims by him on account of the condition or of the late or non-arrival of a print shall be barred hereunder unless such claim shall be made by telegram, setting forth fully the condition complained of, within twenty-four hours after the exhibition date determined hereunder.

**CHANGE OF TITLE—**

TENTH: The Distributor shall have and hereby reserves the right in its sole discretion to change the title of the motion picture specified in the Schedule, to change any story, book or play, to make any change in or adaptation thereof and to change the cast or any member and the director of any thereof excepting the director of a picture described in the Schedule as the motion picture of a particular director.

**CUTTING OR ALTERATION OF PRINTS—**

ELEVENTH: The exhibitor shall exhibit each picture in its entirety and shall not copy, duplicate, subrent or part with possession of any print thereof nor shall the exhibitor cut or alter the same, excepting to make necessary repairs thereto, or when required by any duly authorized public official or authority or with the written or telegraphic consent of the distributor, and the exhibitor shall return each print in the same condition as received, reasonable wear only excepted.

**CLEARANCE AND RUN—**

TWELFTH: (a) Provided the Exhibitor is not in default hereunder, the Exhibitor agrees to observe the Clearance specified in the schedule hereof.

(b) If the Exhibitor is granted hereunder a second or subsequent run, the Distributor shall have the right in its sole discretion to advance the Exhibitor's run by giving notice in writing to such effect to the Exhibitor, and the Exhibitor agrees to exhibit such motion picture in accordance therewith, even though the Exhibitor's run thus becomes a first run and there are no runs prior thereto.

**ADVERTISING PRIOR TO FIRST RUN—**

THIRTEENTH: If the Exhibitor is granted hereunder a second or subsequent run, the Exhibitor agrees not to advertise the said picture except by means of advertisements inside the said theatre not intended for removal therefrom by the public, prior to the exhibition of this picture by any other exhibitor having the right to the first or prior run hereof. In the event of any violation of this clause the Exhibitor agrees to pay to the Distributor a sum equal to the damage, if any, so caused such other Exhibitor, and the Distributor may, at its option, terminate the license granted hereunder. The Distributor, however, shall not be liable for any breach of the provisions of this article caused by any other exhibitor.

**TAXES—**

FOURTEENTH: The exhibitor shall pay to the distributor upon demand, any tax, fee or other like charge now and/or hereafter imposed upon the delivery, and/or the exhibition of prints of motion pictures and/or upon the sums payable under this license by the exhibitor to the Distributor.

**IMPOSSIBILITY OF PERFORMANCE—**

FIFTEENTH: Neither party shall be liable *unto the other for a default caused by force majeur.*



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[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF INTENTION TO APPLY FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER—Filed December 17, 1936

To His Excellency the Governor of West Virginia:

To the Honorable the Attorney General of West Virginia:

To Fred L. Fox, Individually and in His Official Capacity as Tax Commissioner of the State of West Virginia:

You will please take notice that, on the verified bill of complaint to be filed herein, a copy of which is served upon you with this notice, the undersigned United Artists Corporation, a corporation, will apply to the United States District Court for the Southern District of West Virginia, at Charleston, at 9:15 A. M. on December 17, 1936, for an interlocutory injunction enjoining and restraining the defendant according to the prayer of said bill of complaint, and that the undersigned will also apply to said Court at said time and place for a temporary restraining order enjoining and restraining the defendant as aforesaid.

Dated at Charleston, West Virginia, this the 11th day of December, 1936.

United Artists Corporation, by Counsel. Brown, Jackson & Knight, Solicitors.

Service of the within notice is accepted this 11th day of December, 1936.

Fred L. Fox, Fred L. Fox, Individually and in His [fol. 21] Official Capacity as Tax Commissioner of the State of West Virginia. Homer A. Holt, Attorney General of West Virginia. H. G. Kump, Governor of West Virginia.

[fol. 22] IN UNITED STATES DISTRICT COURT

SUBPOENA IN EQUITY

UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

The President of the United States of America to the Marshal of the Southern District of West Virginia, Greeting:

You are hereby commanded to summon Fred L. Fox, individually and in his official capacity as Tax Commissioner of the State of West Virginia, a citizen of and resident in West Virginia, if he be found in your District, to be and appear in the District Court of the United States for the Southern District of West Virginia, aforesaid, in the Clerk's office of said Court, at Charleston, on the 6th day of January, 1937, to answer a certain Bill in Equity, filed and exhibited in said Court against him by United Artists Corporation, a corporation, a citizen of and resident in the State of Delaware.

Hereof you are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia, this 17th day of December, 1936, and in the 161st year of the Independence of the United States of America.

Attest: Ira H. Mottesheard, Clerk, D. C. U. S., S. D. W. Va. (Seal.)

Memorandum

The said defendant is required to file an answer or other defense in this suit in the Clerk's office of said Court, on or before the twentieth day after service, excluding the day thereof; otherwise the said bill may be taken pro Confesso.

Ira H. Mottesheard, Clerk. (Seal.)

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[fol. 23] MARSHAL'S RETURN ON SUBPOENA IN EQUITY

Received this writ at Charleston, West Virginia, on the 1[illegible]th day of December, 1936, and served the same upon J. F.

Bouchelle, Attorney-at-Law, who accept- service for and on behalf of Fred L. Fox, individually and as State Tax Commissioner for the State of West Virginia, by delivering to him in person on that day a true copy of the same at Charleston, Kanawha County, West Virginia.

George P. Alderson, United States Marshal, by J. F. Hoffman, Deputy.

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[fols. 24-25] Bond on injunction for $5,000.00, approved and filed December 17, 1936, omitted in printing.

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[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—January 5, 1937

This day came the parties to the above styled action and the defendant, by counsel, asking leave for additional time in which to file his answer and by agreement of counsel and by leave of the Court it is adjudged, ordered and decreed that the time in which the defendant may file his answer is extended to February 2, 1937.

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[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING PARTY DEFENDANT—February 10, 1937

This day came the plaintiff, by counsel, and showed to the Court that Fred L. Fox, the defendant in this case, resigned as the State Tax Commissioner of West Virginia and ceased to hold such office on December 31, 1936, and that Ernest K. James was appointed to and entered upon the duties of the office of Acting State Tax Commissioner of West Virginia on January 1, 1937, and that the said Ernest K. James now holds that office and is the successor to the said Fred L. Fox in every way affecting this cause; and the said plaintiff by counsel applied to and moved the Court to permit this cause to be continued and maintained

by the plaintiff against the said Ernest K. James as aforesaid. And it appearing to the Court that there is a substantial need for so continuing and maintaining this cause and obtaining an adjudication of the questions involved herein, and that the said Ernest K. James has been given reasonable notice of said application and motion, and no objection being made and none appearing to the Court, the said application and motion is granted, and it is ordered that this cause be and the same is continued and maintained by the said plaintiff, United Artists Corporation, a corporation, against Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia. And the said Ernest K. James is substituted in this cause as the defendant herein for and in the place of said Fred L. Fox.

And the said defendant Ernest K. James appeared by the Attorney General of the State of West Virginia and asked that the time allowed to the defendant in which to [fol. 28] answer the bill of complaint filed herein be extended to February 15, 1937, and the plaintiff not objecting to such request, such time is so extended.

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[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING MOTIONS AND ANSWER—February 15, 1937

This day came the defendant, Ernest K. James, individually, and in his official capacity as Acting Tax Commissioner of the State of West Virginia, by counsel, appearing specially and for the purpose only of tendering and asking leave to file his written motion designated "Motion of Ernest K. James, individually, and in his official capacity as Acting Tax Commissioner of the State of West Virginia, to Dismiss Plaintiff's Bill of Complaint", and his written motion designated "Defendant's Motion to Dismiss Plaintiff's Bill of Complaint", and his written answer to the bill of complaint filed herein, the same being designated "The Answer of the Defendant, Ernest K. James, Individually, and in his official capacity as Acting Tax Commissioner of the State of West Virginia"; and it appearing to the Court that an order was entered on a former

day in this cause extending the time for making answer to the plaintiff's bill of complaint herein until the 15th day of February, 1937, but it having been agreed by counsel for the parties herein that no advantage would be taken of the failure of defendant to file the same on the date last aforesaid if the same should be filed at this time.

It is, therefore, ordered by the Court that the "Motion of Ernest K. James, Individually and in his Official Capacity as Acting Tax Commissioner of the State of West Virginia, to Dismiss Plaintiff's Bill of Complaint", and "Defendant's Motion to Dismiss Plaintiff's Bill of Complaint", and "The [fol. 30] Answer of the Defendant, Ernest K. James, Individually, and in his official capacity as Acting Tax Commissioner of the State of West Virginia", be and the same are hereby filed now as of the 15th day of February, 1937.

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[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF ERNEST K. JAMES, INDIVIDUALLY, ETC., TO DISMISS BILL OF COMPLAINT—Filed February 15, 1937

Now comes Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia, and moves to dismiss the above entitled suit and to dismiss plaintiff's bill of complaint upon the following grounds:

I

The said bill of complaint shows clearly upon its face that the defendant, Ernest K. James, individually, has no personal interest in the privilege tax of the State of West Virginia, which is complained about in plaintiff's bill of complaint; but that it clearly appears from the allegations in said bill that the interest in said tax is in the public represented by the government of the State of West Virginia, who is the adverse claimant with respect to said tax, but who has not been made a party to this suit and who has not consented to be sued herein.

II

The said bill of complaint clearly shows that the defendant, Ernest K. James, in his official capacity as Acting

State Tax Commissioner of West Virginia, has no personal interest in the privilege tax of the State of West Virginia, which is complained about in plaintiff's bill of [fol. 32] complaint; but that it clearly appears from the allegations in said bill that the interest in said tax is in the public represented by the government of the State of West Virginia, who is the adverse claimant with respect to said tax, but who has not been made a party to this suit and who has not consented to be sued herein.

III

In the assessment and collection of West Virginia privilege tax referred to and complained of in plaintiff's bill of complaint, defendant, Ernest K. James, could not and cannot act in his individual capacity, and in the assessment and collection of said privilege tax defendant, Ernest K. James, Acting in his official capacity as Acting State Tax Commissioner of West Virginia, proceeds by virtue of statutory authority and as a public official of the State of West Virginia, and that he is an arm or instrumentality of the State government specifically constituted to carry on this phase of the State's business; that a suit against him as a public official of the State of West Virginia is in fact a suit against the State, and when brought by a resident or citizen of another State diversity of citizenship and Federal jurisdiction is not created

Wherefore, the said defendant, Ernest K. James, prays that said suit and bill of complaint be dismissed as to him individually and in his official capacity as Acting Tax Commissioner of West Virginia, and that he have and recover judgment for his reasonable costs expended herein.

Ernest K. James, Individually and in His Official Capacity as Acting Tax Commissioner of the State of West Virginia. Clarence W. Meadows, Attorney General of West Virginia. Forrest B. Poling, Assistant Attorney General.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S MOTION TO DISMISS BILL OF COMPLAINT—Filed February 15, 1937

Now comes Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of West Virginia, and not waiving his motion to dismiss him in his individual and official capacity from the above styled action, but especially insisting thereon, and moves to dismiss the plaintiff's bill filed in this suit upon each and every one of the following grounds:

I

The said bill of complaint does not allege, state or make out a *cuase* such as to entitle the plaintiff to the relief prayed for or to any relief whatsoever.

II

The laws and statutes of the State of West Virginia give the plaintiff a full, adequate and complete remedy against the enforcement of the privilege tax complained of in the bill of complaint, if the said tax and statute imposing it be improper or unlawful in any respect.

III

The State privilege tax is laid upon the privilege of the plaintiff to transact business within the State of West Virginia, and there is no attempt to impose said tax on any of plaintiff's business transacted in other States or through West Virginia enroute or in course of transportation to other States, and the tax so imposed upon the transaction [fol. 34] of plaintiff's business within the State of West Virginia does not impose a burden upon the interstate business of the plaintiff transacted outside of, in and through the State of West Virginia.

IV

The laws and statutes of the State of West Virginia imposing the State privilege tax complained of, are lawful and constitutional enactments in all respects.

V

The allegations contained in plaintiff's bill of complaint clearly show a manner of transacting plaintiff's business within the State of West Virginia such as constitute said business intrastate rather than interstate.

Wherefore, defendant prays that said suit and said bill of complaint be dismissed, and that defendant may have and recover judgment for his reasonable costs in this behalf expended.

Ernest K. James, Individually and in His Official Capacity as Acting Tax Commissioner of the State of West Virginia. Clarence W. Meadows, Attorney General of West Virginia. Forrest B. Poling, Assistant Attorney General.

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[fol. 35] In United States District Court

[Title omitted]

Answer of Defendant—Filed February 15, 1937

To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

This defendant, not waiving his motions heretofore filed herein to dismiss the plaintiff's bill of complaint, and not waiving his motion heretofore filed herein to dismiss the bill of complaint upon its merits, but insisting thereon, and now at all times hereafter saving and reserving to himself any and all manner of benefits and advantages of exception that may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the plaintiff's said original bill of complaint contained, for answer thereunto, or to so much thereof as he is advised that it is material he should answer, answers and says:

I

The allegations of Paragraph I of the bill of complaint are admitted.

II

The allegations of Paragraph II of the bill of complaint are admitted.

III

This defendant admits that the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum of three thousand dollars.

[fol. 36] This defendant denies that the controversy involved herein is wholly between citizens of different states, but to the contrary says that Ernest K. James, individually or in his official capacity, has no personal interest in the privilege tax of the State of West Virginia, which is complained about in plaintiff's bill of complaint, but, as clearly appears from the allegations in said bill, the interest in said tax is in the public represented by the government of the State of West Virginia, who is the adverse claimant with respect to said tax, but who has not been made a party to this suit and has not consented to be sued herein; and defendant further says with reference to Ernest K. James in his official capacity as Acting Tax Commissioner of the State of West Virginia, that he is a public official of the State of West Virginia and is sued as such, and that such diversity of citizenship does not exist when a suit is brought by a resident or a citizen of another state against a public official of the State of West Virginia acting in his official capacity; that the suit against Ernest K. James as Acting Tax Commissioner of the State of West Virginia, is a suit against a governmental instrumentality or arm of the State of West Virginia and is, in substance and fact, against the State of West Virginia with respect to which diversity of citizenship does not exist.

IV

This defendant admits that plaintiff is engaged in the business of distributing motion pictures from its place of business in the State of New York to exhibitors of motion pictures in practically every state of the United States, including the State of West Virginia, but defendant further says that, in addition to the distribution of said films as aforesaid, plaintiff is also engaged in the business of exhibiting same for profit in said states, and particularly in the State of West Virginia.

This defendant admits that plaintiff has no place of business or office in West Virginia and owns no property in [fol. 37] West Virginia, other than such of its films as are temporarily within West Virginia, except in the manner and form as hereinafter set forth, as to the distribution and exhibition of said films.

This defendant denies, upon information and belief, that plaintiff has no agents or employees in West Virginia, but to the contrary says that he is informed and believes and so states the fact to be, that plaintiff, in the transaction of its business of distributing and exhibiting films throughout the State of West Virginia, employs agents and representatives to personally contact the various exhibitors, and designates certain exhibitors as its agents for the purpose of shipping its films from one point of exhibition to another point of exhibition, all within the State of West Virginia, and more particularly in the manner hereinafter set forth, and has agents or employees operating within the State of West Virginia for the purpose of checking attendance at public exhibitions of such of its films as are leased to exhibitors on a percentage of the total receipts rather than a flat rental.

This defendant admits that plaintiff maintains branch offices in certain cities in the United States, including the city of Cincinnati, in the State of Ohio, Pittsburgh, in the State of Pennsylvania, and Washington, in the District of Columbia, and that no such branch office of like kind or character is maintained in the State of West Virginia.

This defendant admits the further allegations contained in Paragraph IV of said bill of complaint, except as stated further in this paragraph, and this defendant says further that he is informed and believes and so states the fact to be, that the exhibitors of said films, in addition to being authorized by contract to exhibit same for a number of days fixed by said contract, which period of time is usually for one day or for seven days or for some intermediate number of days, that said exhibitors are frequently permitted to modify said contract in such a manner as to permit the exhibitor to continue to exhibit said films for a longer period of time [fol. 38] than first specified in said contract, without shipping said film back to the plaintiff or any of its agents without the State of West Virginia, and without making or entering into any new contract or agreement with the plaintiff or any of its authorized agents without the State of

West Virginia, in the manner and form of the making of the original contract.

This defendant further says that although said contract provides that the exhibitor, at the end of the period of time specified in said contract to exhibit said film, will ship said film or films by a carrier designated or used by plaintiff to some other exhibitor, defendant is informed and believes and so states the fact to be, that said shipment is not usually outside of the State of West Virginia or to the said Cincinnati, Pittsburgh or Washington offices of the plaintiff, whichever shipped the film to the exhibitor, but at the express direction of said plaintiff or its authorized agents said films are shipped to other exhibitors within the State of West Virginia for exhibition thereof, and by that exhibitor in turn shipped to some other exhibitor within the State of West Virginia for exhibition, all pursuant to the direction of the plaintiff or its authorized agents, and that although the contracts are made in New York, and the films produced and owned outside the State of West Virginia and shipped from outside said state into said state to an exhibitor, said films are not immediately after the exhibition thereof by said exhibitor to whom they were first shipped, again shipped out of the State of West Virginia.

V

The allegations of Paragraph V of the bill of complaint are admitted, except in so far as therein stated that under each of such statutes or provisions of the Code an assessment of the tax by the Tax Commissioner was final as to any person who had failed or refused to make a return for the purposes of the tax. On the contrary, this defendant says that said assessment of tax by the Tax Commissioner [fol. 39] was final only in so far as the ruling or finding of said Tax Commissioner, as such, was concerned, in that, the power of said Tax Commissioner thereupon ceased in relation to the assessment of said tax. Defendant says, however, that said plaintiff was in no way thereby deprived of its substantive right to have said final order of the State Tax Commissioner reviewed by the proper state courts of West Virginia, in manner and form as hereinafter set forth.

VI

This defendant admits that the plaintiff may have been advised in the manner and to the effect as set forth in

Paragraph VI of the bill of complaint, but says that he is informed and believes and so states the fact to be, that under and by virtue of the statutes set forth in plaintiff's bill of Complaint, it became and was the duty of plaintiff to first file its return with the State Tax Commissioner of West Virginia, thereby placing said Tax Commissioner in a position to determine whether or not plaintiff came within a class subject to said privilege tax; that with the filing of said return, it also was the duty of the plaintiff, if the legality of said tax was to be questioned, to acquaint the Tax Commissioner with the nature and extent of and the manner in which its business was conducted, and that thereafter, if it was dissatisfied with the ruling of the Tax Commissioner in the premises, a petition for a hearing and correction of said tax should have been filed with the Board of Public Works; that in event of an adverse holding by the Board of Public Works, plaintiff then had the substantive right, under the laws of West Virginia, to have the decision of the Baord of Public Works reviewed by writ of certiorari, by the Circuit Court of Kanawha County, West Virginia, from which Circuit Court an appeal would lie to the Supreme Court of Appeals of West Virginia.

This defendant specifically denies that in the absence of the filing of the taxpayer's return, referred to herein, that the Tax Commissioner acted wrongly and unlawfully in estimating the tax to be imposed upon plaintiff or that any [fol. 40] wrong was perpetrated upon it by reason of the Tax Commissioner failing to serve notice upon it that he would proceed to investigate and estimate the amount of said tax in the absence of said return; and defendant further says that having failed to comply with the provisions of the statutes and having, in effect, acted as "judge of its own case," that plaintiff is not now in position to complain of the act of the Tax Commissioner of West Virginia in computing said tax, nor is plaintiff warranted in seeking the aid of a court of equity.

Defendant further denies that the assessment of said tax was unlawful, or that his actions tend to harrass and annoy the plaintiff in the manner set forth in Paragraph VI of said bill of complaint, and deny further that the pursuance on the part of said Tax Commissioner, of the provisions relating to the collection of said tax are such as would result in a multiplicity of suits, and say that the actions of said Acting Tax Commissioner looking forward to the col-

lection of said tax are lawful in all respects and such as have been given him expressly by virtue of such statutes and the laws of the State of West Virginia.

Defendant further denies that unless said Tax Commissioner is restrained and enjoined, as prayed for in said bill of complaint, that immediate and irreparable damage and injury will result to the plaintiff and its business.

VII

This defendant admits that under the provision of Section 7 of Article 13 of Chapter 11 of said Code, and under the statutes set forth in the bill of complaint, that the assessment made by the defendant against the plaintiff is final, but say that it is final in this respect only; that in so far as said Tax Commissioner is concerned, he has no further powers or duties to perform with reference to the assessment of said tax in the manner of hearings, adjustments or revisions, but that his duties, after said assessment, relate only to the collection of said tax, and that both [fol. 41] his method and the amount of the assessment of the tax as fixed by him in said "final" order are subject to review by writ of certiorari by the Circuit Court of Kanawha County, West Virginia, and by the Supreme Court of Appeals of West Virginia, which said remedies have not been sought by plaintiff before appealing to this court for injunctive relief, although the same are an integral part of the substantive law of the State of West Virginia, and providing a just, speedy and adequate remedy at law for the plaintiff in the matter of having said assessment corrected or annulled in any respect whatsoever.

Defendant further says that had plaintiff filed its return as provided by this statute, that plaintiff would have had an adequate opportunity to have been heard in the matter by the State Tax Commissioner in his administrative capacity; and the defendant further denies that plaintiff has no adequate remedy at law for the reasons heretofore enumerated.

VIII

This defendant denies that plaintiff has never been and is not now engaged in the State of West Virginia in the business of collecting incomes from the use of real or personal property or any interest therein, whether by lease, conveyance or otherwise, and has never been and is not now

engaged in any business in the State of West Virginia and that all of its business has been conducted wholly without said state, but says that the business conducted by the plaintiff in and about the collection of rents, royalties and incomes from the use of its films for exhibition purposes in the State of West Virginia is clearly such a business as comes within the clear purview of the statutes of this state in relation thereto, and which are set forth fully in plaintiff's bill of complaint.

This defendant denies that the business and activities of the plaintiff upon which defendant has levied said tax [fol. 42] are conducted solely in interstate commerce, and that the imposition of said tax will constitute or is an undue burden or hindrance upon interstate commerce and in violation of the Constitution of the United States, or that in so far as said statutes mentioned in said bill of complaint undertake to impose a tax computed upon the income of the plaintiff that they constitute or that any of them constitutes and causes an unlawful exaction on income derived from interstate commerce, and imposes an undue burden and hindrance upon interstate commerce in violation of the Constitution of the United States or that they are particularly contrary and repugnant to Section 8 of Article 1 thereof, and that any of said statutes are thereby void, but to the contrary, says that said tax is a valid privilege tax imposed upon plaintiff by virtue of the fact that said plaintiff is most certainly collecting and deriving an income from the use of its personal property within the State of West Virginia, and any claims, demands or acts of the defendant in relation thereto is not a burden on interstate commerce.

Defendant denies that the provisions of Article 13 of Chapter 11 of said Code of West Virginia and of the statutes set forth in the plaintiff's bill of complaint deny to plaintiff any adequate remedy at law for redress against any tax assessment, for the reason that an adequate and speedy remedy is provided in the manner hereinbefore set forth and available to plaintiff in the state courts of West Virginia, and does not deprive the plaintiff of its property without due process of law or deny to it the equal protection of the laws in contravention to the fifth and fourteenth amendments to the Constitution of the United States.

And now, having fully answered the plaintiff's bill of complaint, this defendant prays that the injunctive and any and all other relief prayed for in said bill of complaint be de-

nied the plaintiff; that the plaintiff's bill of complaint be [fol. 43] dismissed as to this defendant, and that this defendant may be hence dismissed with his reasonable costs in this behalf expended, and as in duty bound, he will ever pray, etc.

Ernest K. James, Individually and in His Official Capacity as Acting Tax Commissioner of the State of West Virginia. Clarence W. Meadows, Attorney General for the State of West Virginia. Forrest B. Poling, Assistant Attorney General.

*Duly sworn to by Ernest K. James. Jurat omitted in printing.*

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[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING STIPULATION—March 8, 1937

This day came the parties by their attorneys, and tendered and asked leave to file a stipulation in writing herein, and the same is ordered to be and is hereby filed.

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[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FACTS—Filed March 8, 1937

It is agreed between counsel for the plaintiff and the defendant herein that the following are the facts in this case:

1. The facts alleged in the bill of complaint are true, excepting any statement therein that may be changed or modified by this stipulation.

2. Nothing in this stipulation shall be taken as stating any fact or inference of fact as to such matters as are contained in the Bill of Complaint or other pleadings which are purely conclusions of the pleader as to the rights, duties, acts and omissions to act of either party to this cause in relation to the statutes involved herein.

3. The plaintiff employs a representative who comes into the State of West Virginia regularly and spends approximately one-half of his employed time in said State encouraging and soliciting various theatre managers or owners therein to exhibit the plaintiff's films, and in doing so, it is the custom and practice of said representative to exhibit to said theatre managers or owners the public announcements of the motion pictures the plaintiff has or will have for release and distribution, and to procure the signature of said theatre managers or owners to written applications in the form of offers to the plaintiff at its place of business in New York.

[fol. 46] 4. The plaintiff does not designate and has never designated exhibitors in West Virginia to act as its agents for the purpose of shipping films to other exhibitors in West Virginia, unless agency is established by the fact that on two occasions during the year 1936 it requested an exhibitor to forward a film to another exhibitor within the State, which other exhibitor then returned the film in each instance to the plaintiff without the State. On all other occasions in 1936 films were returned by exhibitors directly to the plaintiff without the State. During the year 1936 the plaintiff made a total of 1,546 shipments of films into West Virginia, to 144 theatres, all of which shipments were returned to the plaintiff without the State.

5. The plaintiff did not in 1936 or any other year permit any exhibitor to exhibit a picture for a longer time then the period specified in a contract, unless such exhibitor made a formal request for such privilege and unless such request was officially approved in New York and unless the exhibitor paid additional compensation for such additional time.

6. During the year 1936 the plaintiff caused the admissions to theatres in the State of West Virginia to be checked on eight separate occasions, which checks were made for the purpose of ascertaining the receipts from theatre admissions during the day or days when the pictures of the plaintiff were being exhibited therein, in order to arrive at the correct amount due to the plaintiff from the exhibitor on a percentage basis for the privilege of exhibiting plaintiff's picture by said exhibitor. Said checks were all made by

an independent contractor under an arrangement between the plaintiff and the exhibitor.

R. G. Kelly, Counsel for United Artists Corporation.
Clarence W. Meadows, Attorney General and Counsel for Ernest K. James, Acting Tax Commissioner.

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[fol. 47] In United States District Court

[Title omitted]

Order Calling Additional Judges, etc.—March 19, 1937

For the reasons set out in an order heretofore entered herein, the Honorable George W. McClintic, Judge of this Court, hereby calls to his assistance to hear and determine the application herein for an interlocutory injunction in this cause the Honorable Elliott Northcott, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, and the Honorable Harry E. Watkins, Judge of the United States District Court for the Southern and Northern Districts of West Virginia.

And it is further ordered that said application be and the same is set for hearing at ten o'clock A. M. on the 30th day of March, 1937, at which time the defendant is ordered to appear and show cause, if any he has, why an interlocutory injunction should not issue as prayed for in said bill of complaint.

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[fol. 48] In United States District Court

In Equity. No. 3624

United Artists Corporation, a Corporation,

v.

Ernest K. James, Individually and in His Official Capacity as Acting Tax Commissioner for the State of West Virginia (Successor to Fred L. Fox, the Original Defendant)

Final Decree—May 20, 1938

This cause came on to be heard by the Honorable George W. McClintic, Judge of the United States District Court

for the Southern District of West Virginia, the Honorable Elliott Northcott, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, and the Honorable Harry E. Watkins, Judge of the District Court of the United States for the Southern and Northern Districts of West Virginia, pursuant to Section 266 of the Judicial Code, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That the allegations of the bill are fully sustained and that the plaintiff is not doing business in the State of West Virginia as described in the taxing statute set out in the pleadings herein, and that the transactions of the plaintiff as described in the bill and in the stipulation herein constitute interstate commerce, and that the attempted taxing thereof by the defendant would violate the Constitution of the United States, and that the plaintiff is entitled to have the temporary restraining order heretofore granted in this cause made perpetual, all of which more fully appears from the findings of fact and conclusions of law and the opinion of said three-Judge Court herein which are filed herein and are hereby made a part of the record in this cause.

2. That the said defendant, Ernest K. James, individually and as Tax Commissioner of the State of West Vir-
[fol. 49] ginia, his agents, servants, and employees, be, and they are, and each of them is, hereby forever and perpetually restrained and enjoined from collecting and from attempting to collect from the plaintiff the tax assessed against the plaintiff as set out in the bill of complaint herein, or from imposing, levying, or assessing against the plaintiff any tax measured by the income received, or to be received, by the plaintiff for the use of or for the right to exhibit motion picture films owned by it and distributed to exhibitors in West Virginia, as described in said bill of complaint, and from imposing or attempting to impose upon the plaintiff any interest or penalty on account of the failure of the plaintiff to pay any such tax, and from enforcing or attempting to enforce any penalty against the plaintiff for the non-payment of, or failure to make a return for the purpose of, any such tax.

3. That service of a certified copy of this order upon the defendant shall be sufficient notice thereof.

Elliott Northcott, Judge of the United States Circuit Court of Appeals, Fourth Circuit. Geo. W. McClintic, Judge of the United States District Court for the Southern District of West Virginia. Harry E. Watkins, Judge of the United States District Court for the Southern and Northern Districts of West Virginia.

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[fol. 50] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

No. 3624

UNITED ARTISTS CORPORATION, a Corporation,

versus

ERNEST K. JAMES, Individually and in His Official Capacity as Acting Tax Commissioner for the State of West Virginia (Successor to Fred L. Fox, the Original Defendant)

Suit by the United Artists Corporation against Ernest K. James, Acting Tax Commissioner of West Virginia, for an Injunction

Injunction Awarded

Before Northcott, Circuit Judge, and McClintic and Harry E. Watkins, District Judges

E. W. Knight and R. G. Kelly for plaintiff, Clarence W. Meadows, Attorney General of West Virginia, and Forrest B. Poling, Assistant Attorney General for defendant.

**Findings of Fact, Conclusions of Law and Opinion**

McCLINTIC, District Judge:

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

There is no dispute as to the facts as they were stipulated. The stipulation shows the following material facts.

The plaintiff, United Artists Corporation, a corporation, is one created under the laws of the State of Delaware, with its principal office and chief place of business located [fol. 51] in the City of New York in the State of New York.

The defendant, Ernest K. James, at the time of the submission of this suit, was the Acting Tax Commissioner of the State of West Virginia (successor to Fred L. Fox; set out in the bill herein as Tax Commissioner). He is now the duly appointed and qualified Tax Commissioner. He is a citizen and resident of the City of Charleston, Kanawha County, West Virginia, and of the Southern Judicial District of West Virginia, and as such Tax Commissioner is charged with the duty of collecting taxes for the State of West Virginia and administering and enforcing the tax laws of the State of West Virginia.

This is a suit of a civil nature in equity. The controversy involved therein is wholly between citizens of different states, and the amount in controversy therein exceeds three thousand dollars, exclusive of interest and costs.

The plaintiff is engaged in the business of distributing motion pictures from its place of business in the State of New York to exhibitors of motion pictures in practically every state of the United States, including the State of West Virginia.

The plaintiff has no place of business, office, agents or employees in West Virginia, and owns no property in West Virginia other than such of its films as are temporarily within West Virginia for exhibition purposes.

The plaintiff maintains branch offices in certain cities of the United States, including the Cities of Cincinnati in the State of Ohio, Pittsburgh in the State of Pennsylvania and Washington in the District of Columbia, but no office of any kind is maintained in the State of West Virginia.

The method of doing business between the plaintiff and West Virginia exhibitors is as follows: The plaintiff makes public announcement from time to time of motion pictures that it has or will have for release. Theatre owners or managers who desire to exhibit motion pictures that the plaintiff has or expects to have for distribution make [fol. 52] written application in the form of an offer to the plaintiff at its place of business in New York, usually through the representatives of one of the three branches

above named, for a certain picture or for a number of certain pictures or for a number of pictures to be selected by the exhibitor.

The plaintiff, through its proper officers or representatives at its main office in the City of New York, rejects or accepts such application and offer. When such application and offer is accepted a contract is made by executing upon such application and offer an acceptance thereof in the State of New York, and returning such contract, composed of the application and offer and such acceptance, to the said exhibitor.

Such contract provides that the motion picture films therein specified or to be selected as therein provided for will at the time or times specified or provided for be sent by the plaintiff to the exhibitor, who is by the contract authorized to exhibit such films for a number of days fixed by the contract, which period of time is usually for one day or for seven days or for some intermediate number of days. The contract provides that the exhibitor will pay the plaintiff for the right to exhibit such films, which payment is sometimes fixed by the contract as a specified sum of money and sometimes as a specified percentage of the receipts from theatre admissions during the day or days when said picture is exhibited. The contract further provides that the exhibitor at the end of such period will ship said film or films by a carrier designated or used by plaintiff, to some other exhibitor, who is usually outside of the State of West Virginia, or to the Cincinnati office of the plaintiff, or to the Pittsburgh or Washington office of the plaintiff, whichever shipped the film to the exhibitor, such shipment in any event to be at the direction of the plaintiff, and such films are always finally returned to the plaintiff [fol. 53] in New York or at some point without the State of West Virginia.

Pursuant to said contract the plaintiff sends the films from one of said branch offices without the State of West Virginia by express or parcel post or other carrier to the exhibitor in West Virginia. Such exhibitor then exhibits such films in ordinary motion picture theatres, and charges an admission fee to such of the public as desire to see such exhibition. When the use of the pictures is completed according to the contract they are re-shipped on advices given by the plaintiff. Usually said contracts are sent by

the New York office of the plaintiff to its said Cincinnati or Washington, D. C., or Pittsburgh office, and by said office to West Virginia exhibitors. There are a large number of exhibitors of plaintiff's films in the cities and towns of West Virginia, such films being exhibited in nearly all the counties in said State. All prints and films of the motion pictures licensed for exhibition by exhibitors in West Virginia are manufactured and made in laboratories in the State of California, and all of such prints and films are sent from California to Cincinnati, Pittsburgh, and Washington and thence to exhibitors in West Virginia. Always the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff without the State.

The plaintiff employs a representative who comes into the State of West Virginia regularly and spends approximately one-half of his employed time in said State encouraging and soliciting various theatre managers or owners therein to exhibit the plaintiff's films, and in doing so, it is the custom and practice of said representative to exhibit to said theatre managers or owners the public announcements of the motion pictures the plaintiff has or will have [fol. 54] for release and distribution, and to procure the signatures of said theatre managers or owners to written applications in the form of offers to the plaintiff at its place of business in New York.

The plaintiff does not designate and has never designated exhibitors in West Virginia to act as its agents for the purpose of shipping films to other exhibitors in West Virginia. On two occasions in the year 1936 it requested an exhibitor to forward a film to another exhibitor within the state, which other exhibitor then returned the film in each instance to the plaintiff without the state.

On all other occasions in 1936 films were returned by exhibitors directly to the plaintiff without the state. During the year 1936 the plaintiff made a total of fifteen hundred and forty-six shipments of films into West Virginia, to one hundred and forty-four theatres, all of which shipments were returned to the plaintiff without the state.

The plaintiff did not, in 1936 or any other year, permit any exhibitor to exhibit a picture for a longer time than the period specified in a contract, unless such exhibitor made a formal request for such privilege and unless such request was officially approved in New York and unless the exhibitor paid additional compensation for such additional time.

During the year 1936 the plaintiff caused the admissions to theatres in the State of West Virginia to be checked on eight separate occasions, which checks were made for the purpose of ascertaining the receipts from theatre admissions during the day or days when the pictures of the plaintiff were being exhibited therein, in order to arrive at the correct amount due to the plaintiff from the exhibitor on a percentage basis for the privilege of exhibiting plaintiff's pictures by said exhibitor. These checks were all made by an independent contractor under an arrangement between the plaintiff and the exhibitor.

[fol. 55] By Article 13 of Chapter 11 of the West Virginia Code of 1932, as amended and in effect from March 9, 1935, such Article dealing with the Business and Occupation Tax of West Virginia, it is provided that (Section 2-(h)) a tax equal to one per cent of gross income is levied upon and shall be collected from every person engaging or continuing within the State in any service business or calling not otherwise specifically taxed under said law; that (Section 2-(i)) upon every person engaging or continuing within the State of West Virginia in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance, or otherwise, and whether the return be in the form of rentals, royalties, fees, interest, or otherwise, the tax shall be one per cent of the gross income of any such activity; that (Section 4) taxes levied under said Article 13 shall be payable in quarterly installments on or before the expiration of thirty days from the end of the quarter in which they accrue, and the taxpayer shall within thirty days from the expiration of each quarter make out an estimate of the tax for which he is liable for such quarter, verify the same by oath and mail the same, together with a remittance in the form required, to the office of the defendant; that (Section 5) on or before thirty days after the end of the tax year each person liable for the payment of any such tax shall make a return showing the

gross proceeds of sales or gross income of business, compute the amount of tax chargeable against him in accordance with the provisions of said Article, deduct the amount of quarterly payments, if any, and transmit with his report a remittance in the required form covering the residue of the tax chargeable against him to the defendant.

Such article further provides that (Section 7) if any person fail or refuse to make return, or if the Tax Commissioner has reasonable ground to believe that any return [fol. 56] made is so deficient as not to form the basis of a satisfactory assessment of tax, the Tax Commissioner may proceed as he deems best to obtain information on which to base the assessment of the tax, shall assess the tax and notify the person assessed of the amount of the tax; and the assessment of the tax by the Tax Commissioner shall be final as to any person who refused to make a return.

Such Article further provides that (Section 8) any person, having made the return and paid the tax as provided therein, who feels aggrieved by the assessment made upon him, may apply to the Board of Public Works within thirty days after notice is mailed to him by the Tax Commissioner for a hearing and correction of the amount of the tax so assessed against him, said Board may grant or deny such hearing, and upon a hearing, if granted, may make such order as shall appear to it just and lawful; any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the Tax Commissioner, and the Circuit Court of the County in which the taxpayer resides or is located shall have original jurisdiction of any such action and shall adjudge costs to such extent and in such manner as may be deemed equitable, and upon presentation of a certified copy of a judgment in any such action the Auditor of the State of West Virginia shall issue his warrant upon any funds in the State Treasury available for the payment thereof; no injunction shall be awarded to restrain the collection of taxes imposed thereby except upon the ground that the assessment thereof was in violation of the Constitution of the United States or the Constitution of the State of West Virginia, or that the same were fraudulently assessed, or that there was a mistake made in the amount of taxes assessed upon such person, and in the latter case the bill must show an application to the Board

[fol. 57] of Public Works for the correction of the assessment and the payment into the treasury of all taxes appearing by the bill of complaint to be owing.

Such Article further provides that (Section 9) the assessment of taxes and the returns required shall be for the year ending on the 31st day of December; that (Section 11) all remittances of taxes imposed thereby shall be made to the Tax Commissioner and he shall pay the moneys into the State treasury to be kept and accounted for as provided by law; that (Section 12) a tax due and unpaid thereunder shall be a debt due the State and a lien upon the property used in the business or occupation upon which it is imposed, such lien shall have the same priority as the lien of the general property tax, a penalty of five per cent shall be added for any default for thirty days or less, and for each succeeding thirty days of such default there shall be added an additional penalty of one per cent; that (Section 13) the Tax Commissioner may collect taxes due and unpaid thereunder, together with all accrued penalties, by an action in assumpsit, motion for judgment, or other appropriate proceedings in the Circuit Court of the County in which the privilege taxed has been exercised; and in the event of default in payment of the tax for sixty days after the same shall be due the Tax Commissioner may proceed in the Circuit Court of the County in which the privilege taxed has been exercised to obtain an injunction restraining the further exercise of the privilege until full payment of all taxes and penalties due under said Article; that (Section 20) the Tax Commissioner may distrain upon any goods, chattels, or intangibles of any taxpayer delinquent under said Article for the amount of all taxes and penalties accrued and unpaid thereunder, and he is authorized to require the assistance of the sheriff of any county of the state in levying such distress in the county of which such sheriff is an officer.

[fol. 58] Such Article further provides that (Section 21) it shall be unlawful, under penalty of a fine not exceeding one-thousand dollars and imprisonment not exceeding one year, for any person to refuse to make the return provided for therein, or make any false or fraudulent return or false statement in any return with intent to defraud the state or to evade the payment of the tax or any part thereof imposed thereby, or for any person to aid or abet another in any at-

tempt to evade the payment of such tax, or for an officer of any corporation to make or permit to be made for any corporation any false return or false statement in any return required thereby, with intent to evade the payment of any tax thereunder.

Chapter 1 of the Acts of the Extraordinary Session of the Legislature of West Virginia, effective July 1st, 1925, imposed (Section 2-(g)) a tax of three-tenths of one per cent of the gross income of any business not included in businesses enumerated in the statute, and this provision became Section 2-(g) of said Article 13 of Chapter 11 of the West Virginia Code of 1932, and pursuant to amendment made by Chapter 33 of the Acts of the Legislature of 1933, effective May 26, 1933, the substance of said provision became Section 2-(h) of said Article 13 as now in effect, with an increase of the tax imposed to one per cent of the gross income of any such business. And under each such statute or provisions of the Code an assessment of tax by the Tax Commissioner was final as to any person who had failed or refused to make a return for the purposes of the tax.

The plaintiff, under its view of the case, has never made any of the estimates, reports or returns required by the Code of West Virginia, as amended and now in effect, or by any previous statute to be made by persons engaged in business in West Virginia.

The defendant, under its view of the case, made an assessment of the tax against the plaintiff, as of October [fol. 59] 1st, 1936, of the sum of four-thousand and two dollars and nineteen cents, and demanded the payment of such sum as a tax under the statute, and claims that the plaintiff should pay such tax upon all such sums as it may receive in West Virginia from exhibitors of its films after October 1st, 1936.

The defendant has threatened and now threatens to undertake to enforce the collection of the amount of the tax assessed by him, with all accrued penalties and those to accrue, and for the purpose to bring against the plaintiff actions at law in the counties, or some of them, in which plaintiff's films have been and from time to time are being shown, and in such actions to sue out attachments and to make the exhibitors of plaintiff's films garnishees thereunder, and to distrain plaintiff's films in the possession from time to time of exhibitors in the State of West Virginia,

and further threatened that if plaintiff shall refuse for sixty days to pay the amount of the tax assessed, to institute suits in chancery in the courts of the counties of West Virginia in which the plaintiff's films have been and from time to time are being shown, for an injunction to restrain the further showing of such films until full payment shall be made of all the taxes and penalties claimed by the defendant to be due.

The defendant also threatens to repeat and continue such suits and attachments until he has collected all such taxes and penalties, and also threatens to harass and annoy the exhibitors by the service of notices of garnishment upon them, by seizing under distraint films in their hands from time to time, and by enjoining the showing of plaintiff's films by such exhibitors until the plaintiff has paid the taxes so assessed.

## Conclusions of Law

The Court concludes that there is involved in this suit [fol. 60] the necessary amount to give the District Court of the United States for the Southern District of West Virginia jurisdiction of the cause; that the plaintiff has no adequate remedy at law, and that a court of equity has jurisdiction of the issue; that the plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interest or otherwise; and that the acts of the plaintiff hereinbefore set out constitute "interstate commerce".

## Opinion

This is a suit in equity brought by the plaintiff seeking to restrain the collection of certain taxes sought to be imposed by the State of West Virginia. A District Court of three Judges, organized in accordance with Section 266 of the Judicial Code, as amended (28 U. S. C. A., Sec. 380) heard the case on plaintiff's application for interlocutory and permanent relief.

At the hearing no evidence was taken, the cause being submitted on the stipulation of facts. It was agreed that the hearing should be final.

The tax sought to be imposed upon the plaintiff is a tax of one per cent of the gross income received by the plaintiff from the exhibitors of its films in the State of West Virginia.

In the case of Paramount Pictures Distributing Company, et al. v. Henneford, et al., 184 Wash. 376, 51 Pac. (2) 385, (writ of certiorari denied by Supreme Court, 298 U. S. 665) the court, in reference to the exact same sort of tax, under a similar statute and between a film company and a Tax Commissioner, said:

"* * * The tax provided for in the statute is an excise tax, and not a property tax. It is based upon a percentage [fol. 61] of the gross income of a particular business. State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P. (2d) 91; Supply Laundry Co. v. Jenner, 178 Wash. 72, 34 P. (2d) 353. It being an excise tax for the purpose of raising revenue, the act of the legislature imposing it was not passed in the exercise of the police power. Whether a law is enacted in the exercise of that power depends upon whether the primary purpose is to raise revenue or to regulate industry. If the primary purpose is regulation, it is enacted under the police power, even though it may be called a license or tax. Fox Film Corporation v. Trumbull, 7 Fed. (2d) 715; Cooley on Taxation (3d ed.) vol. 2, p. 1127. As already indicated, chapter 191 of the laws of 1933 and the amendatory acts thereto were plainly enacted for the primary purpose of collecting revenue, and not for the purpose of regulating industry. Cases cited, which hold that the state legislature, in the exercise of the police power, may regulate to some extent a business which is interstate in character, have no application to this case.

Inquiry will now be directed as to whether the business done by the local exchange, in the manner above indicated, is a part of interstate commerce. This presents a federal question, and is controlled by the case of Binderup v. Pathe Exchange, 263 U. S. 291. In that case New York manufacturers and distributors of motion picture films, in the regular course of their business, shipped the films from the state of New York to the state of Nebraska, and delivered them to a Nebraska resident, through a local agent of the manufacturers in that state, and it was there held that the business of the manufacturers and producers of the films and their transactions with the exhibitors were interstate commerce, notwithstanding that in accordance with the contracts the films were delivered through a local exchange

in Nebraska through which they were first consigned and transported."

The opinion in this case then quotes at length from the Binderup Case, which was held as binding upon it so far as the doctrine of interstate commerce is concerned.

We agree with this holding.

The defendant attempts to draw a distinction between anti-trust cases and tax cases, claiming that while the former may be interstate commerce, the latter is not necessarily so. No real authority is cited for this claim, and under all the authorities to the contrary and the facts here, we are unable to agree with this alleged distinction.

The contention of the defendant that the plaintiff had [fol. 62] an adequate administrative remedy is, in our opinion, not tenable. The law quoted heretofore gives the right to pay the tax and sue the Tax Commissioner for its recovery. This remedy, if it can be called such, would be judicial and a Federal Court would have jurisdiction when the other essentials thereof are present.

The defendant further contends that the plaintiff lost any right, when it did not make a return and pay the assessed tax.

If the tax was unlawful, then the plaintiff was not required to pay it and go into a State Court for its recovery (when it has a right to resort to a Federal Court) and if judgment for the recovery of the tax is obtained, to then wait until a legislature, of its own free will, sees fit to appropriate money for the refund.

The Tax Commissioner was required to pay any money collected into the State Treasury immediately upon its receipt, and only the act of an independent legislature, which meets every two years for a constitutional period of sixty days, can take it out.

Since writing the foregoing Opinion the Supreme Court of West Virginia, in the case of the Charleston National Bank, et al. v. Fred L. Fox, has had before it for consideration whether Chapter 87 of the Acts of the Legislature; Regular Session, 1935, providing for the refund of taxes collected and improperly required to be paid by the State Tax Commissioner, had been validly passed by the Legislature.

The Court decided in an opinion filed Nov. 23rd 1937, that it had not been validly enacted and was of no effect. As we see it, this only strengthens our conclusion above.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—May 21, 1938

This cause coming on further to be heard upon the petition of Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), for the allowance of an appeal to the Supreme Court of the United States, in which petition said defendant prays that the amount of security for cost bond to be executed by him be fixed.

It is Ordered that the appeal prayed for is granted; that the permanent injunction is suspended during the pendency of this appeal, upon the condition that the said defendant, Ernest K. James, make and file a cost bond with good and sufficient surety in the sum of Two Thousand Dollars ($2,000.00), conditioned as required by law.

That the Clerk of this Court transmit to the Supreme Court of the United States in the manner provided by law a transcript of such parts of the record and proceedings [fol. 64] herein, duly authenticated, as the parties, defendant and plaintiff, may by praecipe duly designate.

That a citation be issued admonishing the plaintiff to be and appear in the Supreme Court of the United States on or before the 1st day of July, 1938.

Whereupon came the said Ernest K. James, defendant as aforesaid, and tendered a cost bond executed by him as principal, and by Standard Accident Insurance Company, as surety, in the amount of Two Thousand Dollars ($2,000.00), and conditioned according to law and in accordance with the provisions of this order, which bond, having been inspected by the Court, is approved and ordered filed.

Elliott Northcott, Judge of the United States Circuit Court of Appeals for the Fourth Circuit. Geo. W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia. Harry E. Watkins, Judge of the District Court of the United States for the Northern and Southern Districts of West Virginia.

The undersigned counsel of record for the Appellee hereby acknowledge service of a copy of the above order allowing appeal, this 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Counsel for Appellee.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed May 21, 1938

To the Honorable Elliott Northcott, Judge of the United States Circuit Court for the Fourth Circuit; the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia; and the Honorable Harry E. Watkins, Judge of the District Court of the United States for the Northern and Southern Districts of West Virginia, composing the statutory court under the provisions of Section 266, amended, of the Judicial Code:

Now comes the defendant, Ernest K. James, individually, and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), and considering himself aggrieved by the decree entered on the 21st day of May, 1938, in the above-entitled cause, awarding a permanent injunction as prayed for in the complainant's bill of complaint, does hereby appeal therefrom to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is herewith filed, and prays:

1. That this appeal be allowed;

[fol. 66] 2. That a citation be issued to the above-named plaintiff, United Artists Corporation, a corporation organized and existing under the laws of the State of Delaware, as provided by law;

3. That an order be entered herein pending the final disposition of the cause, and that the amount of surety for cost bond be fixed by order allowing the appeal;

4. That a transcript of the record, proceedings and papers upon which said decree was predicated, duly authenticated, be sent to the Supreme Court of the United States, together with the typewritten statement of the defendant disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the decree, and his praecipe indicating the portions

of the record to be incorporated in the transcript, which praecipe and statement are filed herewith.

Ernest K. James, Individually and in His Official Capacity as Acting State Tax Commissioner of the State of West Virginia (Successor to Fred L. Fox, the Original Defendant), by Clarence W. Meadows, Attorney General of West Virginia; W. Holt Woodell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, His Counsel.

The undersigned counsel of record for the plaintiff hereby acknowledge service of a copy of the foregoing petition for appeal, this the 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Counsel for Plaintiff.

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[fol. 67] ORDER ALLOWING APPEAL

Appeal allowed upon defendant's giving bond conditioned as required by law in the sum of Two Thousand Dollars ($2000.00), the same to act as a Supersedeas Bond and also a bond for costs.

Elliott Northcott, Judge of the United States Circuit Court of Appeals for the Fourth Circuit. Geo. W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia. —— ——, Judge of the District Court of the United States for the Northern and Southern Districts of West Virginia.

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[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed May 21, 1938

To Messrs. E. W. Knight and R. G. Kelly, Attorneys of Record for the Plaintiff in the Above Styled Cause:

Please take notice that the defendant in the above styled cause, feeling aggrieved by the decree entered therein, on the 21st day of May, 1938, will, on the 21st day of May, 1938, or as soon thereafter as his counsel may be heard,

present to this Court his petition praying for the allowance of an appeal to the Supreme Court of the United States, and for the entry of an order fixing the amount of security to be given, accompanied with his "Assignment of Errors" and his "Statement on Behalf of Defendant as to Jurisdiction of the Supreme Court of the United States to review Decree upon Appeal," a copy of each of which said papers is hereto attached.

Clarence W. Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Defendant.

[fol. 69] Service of a copy of the above and foregoing notice acknowledged this 18th day of May, 1938.

E. W. Knight, R. G. Kelly, Attorneys for Plaintiff.

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[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 21, 1938

Now comes Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), the defendant in the above-styled cause, by his counsel, and says that there are manifest errors in the record, proceedings and final decree in said cause, upon which he will rely upon his appeal from the decree entered on the 21st day of May, 1938, and, for the purpose of having the cause reviewed in the Supreme Court of the United States, makes the following assignment of errors, to-wit:

1. The court erred in holding, as a conclusion of law, that the State of West Virginia has no power to impose upon and collect from the plaintiff the West Virginia Business and Occupation Tax (Sections 2 (h) and 2 (i), Article 13, Chapter 11, Code of West Virginia, as amended by Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session 1933, and Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935), against the plaintiff, with respect to gross income received

by it from exhibitors of its films in West Virginia, on account of the exhibition thereof in said State, for the reason [fol. 71] that the plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use or real or personal property, or interest therein, whether by lease, conveyance or otherwise, and whether the return be from all rents, royalties, fees, interests or otherwise.

2. The court erred in holding, as a conclusion of law, that the State of West Virginia has no power to impose upon and collect from the plaintiff the West Virginia Business and Occupation Tax (Sections 2 (h) and 2 (i), Article 13, Chapter 11, Code of West Virginia, as amended by Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session 1933, and Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935), against the plaintiff, with respect to gross income received by it from exhibitors of its films in West Virginia, on account of the exhibition thereof in said State, for the reason that the acts of the plaintiff, in and about the exhibition of its films in West Virginia, and the receiving of moneys therefor, constitute "Interstate Commerce."

3. The court erred in awarding the permanent injunction prayed for in the bill of complaint.

Wherefore, the defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), prays that the decree of the District Court of the United States for the Southern District of West Virginia be reversed, and that the injunction granted by said court be dissolved, and a judgment entered in accordance with the rights of the defendant.

Clarence W. Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Defendant.

[fols. 72-102] The undersigned, counsel of record for the plaintiff, hereby acknoweldge service of a copy of the foregoing assignment of errors, this the 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Counsel for Plaintiff.

[fols. 103-104] Bond on appeal for $2,000.00, approved and filed May 21, 1938, omitted in printing.

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[fols. 105-107] Citation, in usual form, showing service on E. W. Knight et al., omitted in printing.

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[fol. 108] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 21, 1938

To the Clerk of the District Court of the United States for the Southern District of West Virginia:

You will please prepare a transcript of the record to be transmitted to the Supreme Court of the United States, in pursuance of the appeal heretofore allowed in this cause, and include therein the following:

The bill of complaint of the plaintiff, with Exhibit A filed therewith;

Notice of motion for temporary restraining order and interlocutory injunction;

Subpoena in equity, with return;

Order filing bill of complaint, noting motion for interlocutory injunction, granting temporary restraining order, assembling three-Judge Court, and continuing action thereon;

Bond given upon obtaining temporary restraining order;

Order substituting Ernest K. James for Fred L. Fox, as defendant;

Order filing "Motion of Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia, to dismiss plaintiff's bill of [fol. 109] complaint," and "Defendant's motion to dismiss plaintiff's bill of complaint," and "The answer of the defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia";

Motion of Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia, to dismiss plaintiff's bill of complaint;

Defendant's motion to dismiss plaintiff's bill of complaint;

Answer of defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner of the State of West Virginia;

Order filing stipulation;

Stipulation of Facts;

Final decree awarding permanent injunction;

Findings of fact, conclusions of law and opinion of the Court;

Notice of application for appeal and acknowledgment of service thereon;

Petition for appeal to the Supreme Court of the United States, and acknowledgment of service thereon;

Assignment of errors accompanying petition for appeal, and prayer for reversal contained therein, and acknowledgment of service thereon;

Statement of defendant (appellant), disclosing points upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question, and acknowledgment of service thereon;

Notice to plaintiff (appellee), calling attention to provisions of Paragraph 3, Rule 12, Rules of the Supreme Court, with acknowledgment of service thereon;

Order allowing the appeal, granting a supersedeas, and approving the cost and supersedeas bond, with acknowledg- [fols. 110-137] ment of service thereon;

Cost bond, with approval of court endorsed thereon;

Citation, with acknowledgment of service thereon;

All orders of the court, filing pleadings, or otherwise, made with reference to the cause, and not specifically mentioned therein;

This praecipe, with acknowledgment of service thereon, and approval of same by counsel of record for plaintiff (appellee) endorsed thereon.

Please certify the same to the Supreme Court of the United States under your seal and in accordance with the rules of said Court and with the laws of the United States relating to such appeals.

Clarence W. Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Appellant.

Dated this 21st day of May, 1938.

The undersigned attorneys of record for the Appellee in the above-entitled cause, hereby acknowledge service of the above Praecipe, and approve the same, this 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Attorneys for Appellee.

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[fols. 138-139] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 140] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON—Filed July 14, 1938

Comes now the appellant in the above-entitled cause and states that the points upon which he intends to rely in this Honorable Court in this case are as follows:

Point I

Appellee is engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or an interest therein, whether by lease, conveyance or otherwise, and whether the returns be in the form of rents, royalties, fees, interests or otherwise.

Point II

The business of the appellee in the State of West Virginia is purely local and intra-state, any interstate character of appellee's business having ceased when its films arrived in West Virginia, and the package in which they were contained was broken so that thereafter any use of said films and the income derived therefrom in the State of West Virginia is a purely intra-state activity and hence taxable by said State.

[fols. 141-142] Point III

Any part of appellee's activities with respect to its business in West Virginia, in the exhibition of its films, which might be said to be in interstate commerce is purely incidental to the local performance of its activities in West Virginia. That for which the appellee received its rentals

and fees was an activity purely local in character, carried on entirely within the State of West Virginia.

And the appellant further adopts and will rely upon the assignments of error filed with his petition for appeal on May 21st, 1938.

Dated this 21st day of May, 1938.

Clarence W. Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Appellant.

Service of a copy of the foregoing statement of points is hereby acknowledged on behalf of the appellee, this the 21st day of May, 1938.

E. W. Knight, R. G. Kelly, Counsel for Appellee.

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[fol. 143] In Supreme Court of the United States

[fol. 144] Stipulation of Parts of Record Necessary for Consideration of Case—Filed July 14, 1938

Appellant and Appellee agree that in their opinion the entire record as filed is necessary for the consideration of the case and needs to be printed by the clerk for the hearing thereof.

Dated this 21st day of May, 1938.

Clarence Meadows, Attorney General of West Virginia; W. Holt Wooddell, Assistant Attorney General; Forest B. Poling, Assistant Attorney General, Counsel for Appellant. Clarence W. Meadows, Counsel for Appellant. R. G. Kelly, Counsel for Appellee.

[fol. 145] [File endorsement omitted.]

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Endorsed on cover: File No. 42,646. S. West Virginia, D. C. U. S. Term No. 161. Ernest K. James, Individually and in his Official Capacity as Acting Tax Commissioner for the State of West Virginia, appellant, vs. United Artists Corporation. Filed June 30, 1938. Term No. 161, O. T., 1938.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 30 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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# No. 161

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ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, *Appellant*,

*vs.*

UNITED ARTISTS CORPORATION.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

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## STATEMENT AS TO JURISDICTION.

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CLARENCE W. MEADOWS,
*Attorney General of West Virginia,*
W. HOLT WOODDELL,
*Assistant Attorney General,*
FORREST B. POLING,
*Assistant Attorney General,*
*Counsel for Appellant.*

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| Acts of the Legislature of West Virginia, passed at the Regular Session of said Legislature of 1935, on March 9, 1935, Chapter 86, in effect from passage and published as Chapter 86 of the Official Acts of the West Virginia Legislature, Regular Session, 1935, pages 376-381, inclusive, and which said statute amended Section 2, Article 13, Chapter 11 of the Code of West Virginia, 1931, as amended by Section 2, Article 13, Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933 | 3, 5, 7, 8 |
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**STATEMENT ON BEHALF OF DEFENDANT AS TO JURISDICTION OF SUPREME COURT OF THE UNITED STATES TO REVIEW DECREE UPON APPEAL.**

(Filed May 21, 1938.)

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**In Equity.**

**No. 3624.**

UNITED ARTISTS CORPORATION, A CORPORATION,
*Plaintiff,*

*vs.*

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA (SUCCESSOR TO FRED L. FOX, THE ORIGINAL DEFENDANT),
*Defendant.*

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Before Northcott, Circuit Judge, and McClintic and Harry E. Watkins, District Judges.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, the defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), submits his statement disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and decree in the above-entitled cause:

A.

**Statutory Provision Conferring Jurisdiction.**

The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment and decree here complained of is conferred by Judicial Code, Section 238, amended (Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; 28 U. S. C. A., Sec. 345), which provides:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:"
>
> * * * * * * *
>
> "(3) Section 380 of this title."

Section 380 of Title 28 U. S. C. A. (Judicial Code, Section 266, amended) referred to in the foregoing statute, reads (in part) as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority

of said three judges shall concur in granting such application. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

**State Statute the Validity of Which is Involved.**

The statute of the State of West Virginia, the validity of which is involved, is Chapter 86, Acts of the Legislature of West Virginia, passed at the Regular Session of said Legislature of 1935, on March 9, 1935, in effect from passage, and published as Chapter 86 of the Official Acts of the West Virginia Legislature, Regular Session, 1935, pages 376-381, inclusive, and which said statute amended Section 2, Article 13, Chapter 11 of the Code of West Virginia, 1931, as amended by Section 2, Article 13, Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933.

Said Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, so far as here material, reads as follows:

AN ACT to provide for the raising of additional public revenue by amending and re-enacting article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, relating to business and occupation taxes, by repealing all of sections one through seventeen, inclusive, and enacting and re-enacting sections one through twenty-three, inclusive; and providing for and imposing a privilege tax upon the exercise of certain privileges in the state, by repealing sections eighty-one through eighty-four, inclusive, article twelve, chapter eleven of said code; and enacting a new article to be designated article twelve-(a), chapter eleven of said code.

*Be it enacted by the Legislature of West Virginia:*

That sections one through seventeen, inclusive, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, be and are hereby repealed and sections one through twenty-three, inclusive, be and are hereby enacted in lieu thereof; and that sections eighty-one through eighty-four, inclusive, article twelve, chapter eleven of said code be and are hereby repealed and article twelve-(a) be and is hereby enacted and added to chapter eleven.

SECTION 1. When used in this article, the term "person" or the term "company" herein used interchangeably, includes any individual, firm, copartnership, joint adventure, association, corporation, trust or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

"Tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commissioner to use same as the tax period in lieu of the calendar year.

"Sale" or "sales" includes the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale.

"Taxpayer" means any person liable for any tax hereunder.

"Gross income" means the gross receipts of the taxpayer received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in; including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties, interest or discount paid or any other expense whatsoever.

"Business," as used in this article, shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect. The production of raw materials or manufactured products, which are used or consumed in the main business, shall be deemed business engaged in taxable in the class in which it falls.

"Gross proceeds of sales" means the value actually proceeding from the sale of tangible property without any deduction on account of the cost of property sold or expenses of any kind. The words "gross income" and "gross proceeds of sales" shall not be construed to include cash discounts allowed and taken on sales; the proceeds of sale of goods, wares or merchandise returned by customers when the sale price is refunded either in cash or by credit; or the sale price of any article accepted as part payment on any new article sold, if the full sale price of the new article is included in the "gross income" or "gross proceeds of sales."

"Service business or calling" shall include all non-professional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the production or sale of tangible property, but shall not include the services rendered by an employeee to his employer.

The classification of "wholesaler" or "jobber" shall apply only to a person doing a regularly organized jobbing business, known to the trade as such, selling to licensed retail merchants or jobbers, or to others in wholesale quantities and at wholesale prices.

Said Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935, so far as here material, reads as follows:

AN ACT to amend section two, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one as amended by section two, article thirteen, chapter thirty-three, acts of the Legislature, first extraordinary session, one thousand

nine hundred thirty-three, and to amend said article thirteen by adding thereto sections two-(a) to two-(i), inclusive, relating to business, occupation and privilege taxes.

*Be it enacted by the Legislature of West Virginia:*

That section two, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended by section two, article thirteen, chapter thirty three, acts of the Legislature, first extraordinary session, one thousand nine hundred thirty-three, be amended and reenacted and that said article thirteen be amended by the addition thereto of sections two-(a) to two-(i), inclusive, to read as follows:

SECTION 2. There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-(a) to two-(i) inclusive, of this article.

* * * * * * *

SEC. 2-(h). Upon every person engaging or continuing within this state in any service business or calling not otherwise specifically taxed under this act, there is likewise hereby levied and shall be collected a tax equal to one per cent of the gross income of any such business.

SEC. 2-(i). Upon every person engaging or continuing within this state in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rentals, royalties, fees, interest or otherwise, the tax shall be one per cent of the gross income of any such activity: *Provided,* That any person who shall make return of and pay a personal net income tax on the incomes covered by this section two-(i) shall not be required to pay the tax herein imposed upon said incomes.

C.

**The Date of Decree and Application for Appeal.**

The decree sought to be reviewed was entered on the 21st day of May, 1938.

The application for appeal is presented on this the 21st day of May, 1938.

D.

**Nature of Case and Rulings of the Court.**

This is a suit in equity brought in the United States District Court for the Southern District of West Virginia, by United Artists Corporation, a corporation organized and existing under the laws of the State of Delaware, against the defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), to secure an injunction to restrain the defendant from collecting, by levy or otherwise, in the manner provided by law for such cases, a tax assessed against the plaintiff, in the amount of $4,402.19, under the provisions of the taxing statute of the State of West Virginia, commonly known as the "Business and Occupation Tax", as found in Article 13, Chapter 11, Code of West Virginia, 1931, as amended by Article 13, Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, and by Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935. The gross income of the plaintiff with respect to which said assessment was made and collection of tax sought, was that received by the plaintiff by virtue of certain rental or lease contracts entered into by and between the plaintiff and certain motion picture exhibitors in the State of West Virginia, under which films belonging to the plaintiff were exhibited throughout theaters located in the State of West Virginia, and for which the plaintiff re-

ceived certain sums of money. All of said gross income attempted to be taxed and assessed for taxation arises solely from the leasing or renting of said films to theater owners wholly within said State of West Virginia.

The bill alleged that the defendant had made the assessment against the plaintiff, and threatened the plaintiff that he would attach funds due the plaintiff from the exhibitors of its films, and attach or distrain the plaintiff's films in the possession of such exhibitors and invoke all other civil remedies and criminal penalties provided by statute, unless said tax was paid.

Plaintiff gave notice of application for and sought an interlocutory injunction and insisted thereon, and sought the relief upon the alleged unconstitutionality of the Act, under the Constitution of the United States, as applied to the plaintiff's business involved, because (1) the plaintiff was not nor has never been engaged in doing business within the State of West Virginia within the purview and meaning of said taxing statutes; (2) the business and activities of the plaintiff upon which the taxes sought to be levied are conducted solely in interstate commerce; (3) the provisions of Article 13, Chapter 11 of the Code of West Virginia, as amended, deny to the plaintiff equal protection of the laws and deprive said plaintiff of its property without due process of law, all in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The defendant resisted the granting of injunctive relief on the grounds that plaintiff was engaged in doing business within the State of West Virginia, and particularly within the purview of the taxing statutes applicable thereto, in that it was collecting incomes from the use of real and personal property, or an interest therein, by lease or rental agreement, and receiving therefor moneys in the form of rentals, royalties and fees, and generally that said plaintiff

was engaging or continuing within said State of West Virginia in a certain business or calling, to-wit, the renting or leasing of its films and collecting rents, profits and fees therefor; that plaintiff in and about its said business was not engaged in interstate commerce, but that upon the delivery in the State of West Virginia of its films, and the breaking of the package in which the same were contained, that interstate commerce ceased, and that the activities of the plaintiff in West Virginia consisted solely of activities carried on in intrastate commerce, in that the exhibiting of said films in the State of West Virginia was independent of, and wholly apart from any interstate transaction, and was purely one disassociated therefrom, and carried on in intrastate commerce, the interstate commerce feature thereof being purely incidental to the local exhibition of said films in West Virginia.

The judge of the District Court convened a court of three judges under Section 266, amended, of the Judicial Code (28 U. S. C. A., Sec. 380).

The court, upon hearing the cause, held that a jurisdictional amount was involved, that the plaintiff had no adequate remedy at law, and that therefore the court was empowered to entertain the application for injunction; that the plaintiff was not engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees or otherwise; and that the acts of the plaintiff in and about the conduct of its business in West Virginia constituted "interstate commerce" and hence that the State of West Virginia had no power to impose upon and collect from the plaintiff the tax involved, and that the plaintiff was entitled to the relief prayed for, and entered the order from which this

appeal was taken, perpetually enjoining and restraining the defendant from enforcing the state tax against the plaintiff, with respect to the income received from the leasing, renting, and use of its films in West Virginia.

**Cases believed to Sustain Jurisdiction.**

Cases sustaining direct appeal to the Supreme Court of the United States from a special statutory court convened under Section 266, amended, of the Judicial Code, are:

*Fox* v. *Standard Oil Company*, 294 U. S. 87;
*A. Magnano Company* v. *Hamilton*, 292 U. S. 40;
*Stewart Dry Goods Company* v. *Lewis*, 294 U. S. 550;
*Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626;
*James* v. *Dravo Contracting Company*, 82 L. Ed. 125.

It is, therefore, respectfully submitted that the Supreme Court of the United States has jurisdiction of the appeal petitioned for in this case.

CLARENCE W. MEADOWS,
*Attorney General of West Virginia;*
W. HOLT WOODDELL,
*Assistant Attorney General;*
FORREST B. POLING,
*Assistant Attorney General,*
*Counsel for Defendant.*

## EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON.

No. 3624.

UNITED ARTISTS CORPORATION, a Corporation,

versus

ERNEST K. JAMES, Individually and in His Official Capacity as Acting Tax Commissioner for the State of West Virginia (Successor to Fred L. Fox, the Original Defendant).

Suit by the United Artists Corporation Against Ernest K. James, Acting Tax Commissioner of West Virginia, for an Injunction.

Injunction Awarded.

Before Northcott, Circuit Judge, and McClintic and Harry E. Watkins, District Judges.

E. W. Knight and R. G. Kelly for plaintiff, Clarence W. Meadows, Attorney General of West Virginia, and Forrest B. Poling, Assistant Attorney General for Defendant.

McCLINTIC, *District Judge:*

The Court makes the following findings of fact and conclusions of law;

FINDINGS OF FACT.

There is no dispute as to the facts as they were stipulated. The stipulation shows the following material facts.

The Plaintiff, United Artists Corporation, a corporation, is one created under the laws of the State of Delaware, with its principal office and chief place of business located in the City of New York in the State of New York.

The defendant, Ernest K. James, at the time of the submission of this suit, was the Acting Tax Commissioner

of the State of West Virginia (successor to Fred L. Fox, set out in the bill herein as Tax Commissioner). He is now the duly appointed and qualified Tax Commissioner. He is a citizen and resident of the City of Charleston, Kanawha County, West Virginia, and of the Southern Judicial District of West Virginia, and as such Tax Commissioner is charged with the duty of collecting taxes for the State of West Virginia and administering and enforcing the tax laws of the State of West Virginia.

This is a suit of a civil nature in equity. The controversy involved therein is wholly between citizens of different States, and the amount in controversy therein exceeds three-thousand dollars, exclusive of interest and costs.

The plaintiff is engaged in the business of distributing motion pictures from its place of business in the State of New York to exhibitors of motion pictures in practically every state of the United States, including the State of West Virginia.

The plaintiff has no place of business, office, agents or employees in West Virginia, and owns no property in West Virginia other than such of its films as are temporarily within West Virginia for exhibition purposes.

The plaintiff maintains branch offices in certain cities of the United States, including the Cities of Cincinnati in the State of Ohio, Pittsburgh in the State of Pennsylvania and Washington in the District of Columbia, but no office of any kind is maintained in the State of West Virginia.

The method of doing business between the plaintiff and West Virginia exhibitors is as follows: The plaintiff makes public announcement from time to time of motion pictures that it has or will have for release. Theatre owners or managers who desire to exhibit motion pictures that the plaintiff has or expects to have for distribution make written application in the form of an offer to the plaintiff at its place of business in New York, usually through the representatives of one of the three branches above named, for a certain picture or for a number of certain pictures or for a number of pictures to be selected by the exhibitor.

The plaintiff, through its proper officers or representatives at its main office in the City of New York, rejects or ac-

cepts such application and offer. When such application and offer is accepted a contract is made by executing upon such application and offer an acceptance thereof in the State of New York and returning such contract, composed of the application and offer and such acceptance, to the said exhibitor.

Such contract provides that the motion picture films therein specified or to be selected as therein provided for will at the time or times specified or provided for be sent by the plaintiff to the exhibitor, who is by the contract authorized to exhibit such films for a number of days fixed by the contract, which period of time is usually for one day or for seven days or for some intermediate number of days. The contract provides that the exhibitor will pay the plaintiff for the right to exhibit such films, which payment is sometimes fixed by the contract as a specified sum of money and sometimes as a specified percentage of the receipts from theatre admissions during the day or days when said picture is exhibited. The contract further provides that the exhibitor at the end of such period will ship said film or films by a carrier designated or used by plaintiff, to some other exhibitor, who is usually outside of the State of West Virginia, or to the Cincinnati office of the plaintiff, or to the Pittsburgh or Washington office of the plaintiff, whichever shipped the film to the exhibitor, such shipment in any event to be at the direction of the plaintiff, and such films are always finally returned to the plaintiff in New York or at some point without the State of West Virginia.

Pursuant to said contract the plaintiff sends the films from one of said branch offices without the State of West Virginia by express or parcel post or other carrier to the exhibitor in West Virginia. Such exhibitor then exhibits such films in ordinary motion picture theatres, and charges an admission fee to such of the public as desire to see such exhibition. When the use of the pictures is completed according to the contract they are re-shipped on advices given by the plaintiff. Usually said contracts are sent by the New York office of the plaintiff to its said Cincinnati or Washington, D. C., or Pittsburgh office, and by said office to West Virginia exhibitors. There are a large number of exhibitors of plair-

tiff's films in the cities and towns of West Virginia, such films being exhibited in nearly all the counties in said State. All prints and films of the motion pictures licensed for exhibition by exhibitors in West Virginia are manufactured and made in laboratories in the State of California, and all of such prints and films are sent from California to Cincinnati, Pittsburgh, and Washington and thence to exhibitors in West Virginia. Always the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff without the State.

The plaintiff employs a representative who comes into the State of West Virginia regularly and spends approximately one-half of his employed time in said State encouraging and soliciting various theatre managers or owners therein to exhibit the plaintiff's films, and in doing so, it is the custom and practice of said representative to exhibit to said theatre managers or owners the public announcements of the motion pictures the plaintiff has or will have for release and distribution, and to procure the signatures of said theatre managers or owners to written applications in the form or offers to the plaintiff at its place of business in New York.

The plaintiff does not designate and has never designated exhibitors in West Virginia to act as its agents for the purpose of shipping films to other exhibitors in West Virginia. On two occasions in the year 1936 it requested an exhibitor to forward a film to another exhibitor within the state, which other exhibitor then returned the film in each instance to the plaintiff without the state.

On all other occasions in 1936 films were returned by exhibitors directly to the plaintiff without the state. During the year 1936 the plaintiff made a total of fifteen hundred and forty-six shipments of films into West Virginia, to one-hundred and forty-four theatres, all of which shipments were returned to the plaintiff without the state.

The plaintiff did not, in 1936 or any other year, permit any exhibitor to exhibit a picture for a longer time than the

period specified in a contract, unless such exhibitor made a formal request for such privilege and unless such request was officially approved in New York and unless the exhibitor paid additional compensation for such additional time.

During the year 1936 the plaintiff caused the admissions to theatres in the State of West Virginia to be checked on eight separate occasions, which checks were made for the purpose of ascertaining the receipts from theatre admissions during the day or days when the pictures of the plaintiff were being exhibited therein, in order to arrive at the correct amount due to the plaintiff from the exhibitor on a percentage basis for the privilege of exhibiting plaintiff's pictures by said exhibitor. These checks were all made by an independent contractor under an arrangement between the plaintiff and the exhibitor.

By Article 13 of Chapter 11 of the West Virginia Code of 1932, as amended and in effect from March 9, 1935, such Article dealing with the Business and Occupation Tax of West Virginia, it is provided that (Section 2-(h)) a tax equal to one percent of gross income is levied upon and shall be collected from every person engaging or continuing within the State in any service business or calling not otherwise specifically taxed under said law; that (Section 2-(i)) upon every person engaging or continuing within the State of West Virginia in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance, or otherwise, and whether the return be in the form of rentals, royalties, fees, interest, or otherwise, the tax shall be one percent of the gross income of any such activity; that (Section 4) taxes levied under said Article 13 shall be payable in quarterly installments on or before the expiration of thirty days from the end of the quarter in which they accrue, and the taxpayer shall within thirty days from the expiration of each quarter make out an estimate of the tax for which he is liable for such quarter, verify the same by oath and mail the same, together with a remittance in the form required, to the office of the defendant; that (Section 5) on or before thirty days after the end of the tax year each person liable for the payment of any such tax shall make a return showing the gross

proceeds of sales or gross income of business, compute the amount of tax chargeable against him in accordance with the provisions of said Article, deduct the amount of quarterly payments, if any, and transmit with his report a remittance in the required form covering the residue of the tax chargeable against him to the defendant.

Such article further provides that (Section 7) if any person fail or refuse to make return, or if the Tax Commissioner has reasonable ground to believe that any return made is so deficient as not to form the basis of a satisfactory assessment of tax, the Tax Commissioner may proceed as he deems best to obtain information on which to base the assessment of the tax, shall assess the tax and notify the person assessed of the amount of the tax; and the assessment of the tax by the Tax Commissioner shall be final as to any person who refused to make a return.

Such Article further provides that (Section 8) any person, having made the return and paid the tax as provided therein, who feels aggrieved by the assessment made upon him, may apply to the Board of Public Works within thirty days after notice is mailed to him by the Tax Commissioner for a hearing and correction of the amount of the tax so assessed against him, said Board may grant or deny such hearing, and upon a hearing, if granted, may make such order as shall appear to it just and lawful; any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the Tax Commissioner, and the Circuit Court of the County in which the taxpayer resides or is located shall have original jurisdiction of any such action and shall adjudge costs to such extent and in such manner as may be deemed equitable, and upon presentation of a certified copy of a judgment in any such action the Auditor of the State of West Virginia shall issue his warrant upon any funds in the State Treasury available for the payment thereof; no injunction shall be awarded to restrain the collection of taxes imposed thereby except upon the ground that the assessment thereof was in violation of the Constitution of the United States or the Constitution of the State of West Virginia, or that the same

were fraudulently assessed, or that there was a mistake made in the amount of taxes assessed upon such person, and in the latter case the bill must show an application to the Board of Public Works for the correction of the assessment and the payment into the treasury of all taxes appearing by the bill of complaint to be owing.

Such Article further provides that (Section 9) the assessment of taxes and the returns required shall be for the year ending on the 31st day of December; that (Section 11) all remittances of taxes imposed thereby shall be made to the Tax Commissioner and he shall pay the moneys into the state treasury to be kept and accounted for as provided by law; that (Section 12) a tax due and unpaid thereunder shall be a debt due the State and a lien upon the property used in the business or occupation upon which it is imposed, such lien shall have the same priority as the lien of the general property tax, a penalty of five per cent shall be added for any default for thirty days or less, and for each succeeding thirty days of such default there shall be added an additional penalty of one per cent; that (Section 13) the Tax Commissioner may collect taxes due and unpaid thereunder, together with all accrued penalties, by an action in assumpsit, motion for judgment, or other appropriate proceedings in the Circuit Court of the County in which the privilege taxed has been exercised; and in the event of default in payment of the tax for sixty days after the same shall be due the Tax Commissioner may proceed in the Circuit Court of the County in which the privilege taxed has been exercised to obtain an injunction restraining the further exercise of the privilege until full payment of all taxes and penalties due under said Article; that (Section 20) the Tax Commissioner may distrain upon any goods, chattels, or intangibles of any taxpayer delinquent under said Article for the amount of all taxes and penalties accrued and unpaid thereunder, and he is authorized to require the assistance of the sheriff of any county of the state in levying such distress in the county of which such sheriff is an officer.

Such Article further provides that (Section 21) it shall be unlawful, under penalty of a fine not exceeding one-

thousand dollars and imprisonment not exceeding one year, for any person to refuse to make the return provided for therein, or make any false or fraudulent return or false statement in any return with intent to defraud the state or to evade the payment of the tax or any part thereof imposed thereby, or for any person to aid or abet another in any attempt to evade the payment of such tax, or for an officer of any corporation to make or permit to be made for any corporation any false return or false statement in any return required thereby, with intent to evade the payment of any tax thereunder.

Chapter 1 of the Acts of the Extraordinary Session of the Legislature of West Virginia, effective July 1st, 1925, imposed (Section 2-(g)) a tax of three-tenths of one per cent of the gross income of any business not included in businesses enumerated in the statute, and this provision became Section 2-(g) of said Article 13 of Chapter 11 of the West Virginia Code of 1932, and pursuant to amendment made by Chapter 33 of the Acts of the Legislature of 1933, effective May 26, 1933, the substance of said provision became Section 2-(h) of said Article 13 as now in effect, with an increase of the tax imposed to one per cent of the gross income of any such business. And under each such statute or provisions of the Code an assessment of tax by the Tax Commissioner was final as to any person who had failed or refused to make a return for the purposes of the tax.

The plaintiff, under its view of the case, has never made any of the estimates, reports or returns required by the Code of West Virginia, as amended and now in effect, or by any previous statute to be made by persons engaged in business in West Virginia.

The defendant, under its view of the case, made an assessment of the tax against the plaintiff, as of October 1st, 1936, of the sum of four-thousand and two dollars and nineteen cents, and demanded the payment of such sum as a tax under the statute, and claims that the plaintiff should pay such tax upon all such sums as it may receive in West Virginia from exhibitors of its films after October 1st, 1936.

The defendant has threatened and now threatens to un-

dertake to enforce the collection of the amount of the tax assessed by him, with all accrued penalties and those to accrue, and for the purpose to bring against the plaintiff actions at law in the counties, or some of them, in which plaintiff's films have been and from time to time are being shown, and in such actions to sue out attachments and to make the exhibitors of plaintiff's films garnishees thereunder, and to distrain plaintiff's films in the possession from time to time of exhibitors in the State of West Virginia, and further threatened that if plaintiff shall refuse for sixty days to pay the amount of the tax assessed, to institute suits in chancery in the courts of the counties of West Virginia in which the plaintiff's films have been and from time to time are being shown, for an injunction to restrain the further showing of such films until full payment shall be made of all the taxes and penalties claimed by the defendant to be due.

The defendant also threatens to repeat and continue such suits and attachments until he has collected all such taxes and penalties, and also threatens to harass and annoy the exhibitors by the service of notices of garnishment upon them, by seizing under distraint films in their hands from time to time, and by enjoining the showing of plaintiff's films by such exhibitors until the plaintiff has paid the taxes so assessed.

## Conclusions of Law.

The Court concludes that there is involved in this suit the necessary amount to give the District Court of the United States for the Southern District of West Virginia jurisdiction of the cause; that the plaintiff has no adequate remedy at law, and that a court of equity has jurisdiction of the issue; that the plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interest or otherwise; and that the acts of the plaintiff hereinbefore set out constitute "interstate commerce."

OPINION.

This is a suit in equity brought by the plaintiff seeking to restrain the collection of certain taxes sought to be imposed by the State of West Virginia. A District Court of three Judges, organized in accordance with Section 266 of the Judicial Code, as amended (28 U. S. C. A., Sec. 380) heard the case on plaintiff's application for interlocutory and permanent relief.

At the hearing no evidence was taken, the cause being submitted on the stipulation of facts. It was agreed that the hearing should be final.

The tax sought to be imposed upon the plaintiff is a tax of one per cent of the gross income received by the plaintiff from the exhibitors of its films in the State of West Virginia.

In the case of *Paramount Pictures Distributing Company et al.* v. *Henneford et al.*, 184 Wash. 376, 51 Pac. (2) 385, (writ of certiorari denied by Supreme Court, 298 U. S. 665) the court, in reference to the exact same sort of tax, under a similar statute and between a film company and a Tax Commissioner, said:

> "* * * The tax provided for in the statute is an excise tax, and not a property tax. It is based upon a percentage of the gross income of a particular business. State ex rel. Stiner *v.* Yelle, 174 Wash. 402, 25 P. (2d) 91; Supply Laundry Co. *v.* Jenner, 178 Wash. 72, 34 P. (2d) 353. It being an excise tax for the purpose of raising revenue, the act of the legislature imposing it was not passed in the exercise of the police power. Whether a law is enacted in the exercise of that power depends upon whether the primary purpose is to raise revenue or to regulate industry. If the primary purpose is regulation, it is enacted under the police power, even though it may be called a license or tax. Fox Film Corporation *v.* Trumbull, 7 Fed. (2d) 715; Cooley on Taxation (3d ed.) vol. 2, p. 1127. As already indicated, chapter 191 of the laws of 1933 and the amendatory acts thereto were plainly enacted for the primary purpose of collecting revenue, and not for the purpose of regulating industry. Cases cited, which hold that the

state legislature, in the exercise of the police power, may regulate to some extent a business which is interstate in character, have no application to this case.

Inquiry will now be directed as to whether the business done by the local exchange, in the manner above indicated, is a part of interstate commerce. This presents a federal question, and is controlled by the case of Binderup *v.* Pathe Exchange, 263 U. S. 291. In that case New York manufacturers and distributors of motion picture films, in the regular course of their business, shipped the films from the state of New York to the state of Nebraska, and delivered them to a Nebraska resident, through a local agent of the manufacturers in that state, and it was there held that the business of the manufacturers and producers of the films and their transactions with the exhibitors were interstate commerce, notwithstanding that in accordance with the contracts the films were delivered through a local exchange in Nebraska through which they were first consigned and transported."

The opinion in this case then quotes at length from the Binderup case, which was held as binding upon it so far as the doctrine of interstate commerce is concerned.

We agree with this holding.

The defendant attempts to draw a distinction between anti-trust cases and tax cases, claiming that while the former may be interstate commerce, the latter is not necessarily so. No real authority is cited for this claim, and under all the authorities to the contrary and the facts here, we are unable to agree with this alleged distinction.

The contention of the defendant that the plaintiff had an adequate administrative remedy is, in our opinion, not tenable. The law quoted heretofore gives the right to pay the tax and sue the Tax Commissioner for its recovery. This remedy, if it can be called such, would be judicial and a Federal Court would have jurisdiction when the other essentials thereof are present.

The defendant further contends that the plaintiff lost any right, when it did not make a return and pay the assessed tax.

If the tax was unlawful, then the plaintiff was not required to pay it and go into a State Court for its recovery (when it has a right to resort to a Federal Court) and if judgment for the recovery of the tax is obtained, to then wait until a legislature, of its own free will, sees fit to appropriate money for the refund.

The Tax Commissioner was required to pay any money collected into the State Treasury immediately upon its receipt, and only the act of an independent legislature, which meets every two years for a constitutional period of sixty days, can take it out.

Since writing the foregoing Opinion the Supreme Court of West Virginia, in the case of the Charleston National Bank et al. *v.* Fred L. Fox, has had before it for consideration whether Chapter 87 of the Acts of the Legislature, Regular Session, 1935, providing for the refund of taxes collected and improperly required to be paid by the State Tax Commissioner, had been validly passed by the Legislature.

The Court decided in an opinion filed Nov. 23rd, 1937, that it had not been validly enacted and was of no effect. As we see it, this only strengthens our conclusion above.

ELLIOTT NORTHCOTT,
*Circuit Judge.*
GEORGE W. MCCLINTIC,
*District Judge.*
HARRY E. WATKINS,
*District Judge.*

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1938

## No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA,

*Appellant,*

*vs.*

UNITED ARTISTS CORPORATION, A CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

## BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM.

CLARENCE W. MEADOWS,
*Attorney General of West Virginia,*
FORREST B. POLING,
*Assistant Attorney General,*
W. HOLT WOODDELL,
*Assistant Attorney General,*
*Counsel for Appellant.*

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1938**

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# No. 161

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ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA,

*Appellant,*

*vs.*

UNITED ARTISTS CORPORATION, A CORPORATION.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

---

## BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM.

---

### Statement as to the Case and the Facts.

Although a stipulation of facts has been entered into relative to this cause, in order to more clearly define the position of the appellant in opposing appellee's motion to affirm, it is believed well to point out certain of said facts which appear to be of special significance and weight relative thereto.

The appellant State Tax Commissioner has asserted the right to collect from the appellee, United Artists Corpora-

tion, a tax of one per cent of the gross proceeds received by appellee by reason of the exhibition in the State of West Virginia of certain of its films. This claim is based upon the following State statute (Chapter 86, Acts of the Legislature, Regular Session, 1935, Section 2-(i), amending Section 2, Article 13, Chapter 11, Code of West Virginia, 1931, as amended by Section 2, Article 13, Chapter 33, Acts of the Legislature, First Extraordinary Session, 1933), the pertinent part of which reads as follows:

> "Upon every person engaging or continuing within this state in the business of collecting incomes *from the use of real or personal property or of any interest therein, whether by lease, conveyance or otherwise,* and whether the return be in the form of rentals, royalties, fees, interest or otherwise, the tax shall be one per cent of the gross income of any such activity: * * *." (Italics ours.)

The three judge court convened for the hearing of the case permanently enjoined the collection of this tax on the grounds (1) that appellee was not engaged in doing business in the State of West Virginia, and (2) that the activities of the appellee constitute "interstate commerce."

The appellee is a Delaware corporation with its chief office in New York City. It distributes to exhibitors and theater owners throughout the State of West Virginia and elsewhere motion picture films, and charges said exhibitors and theater owners various prices for the privilege of exhibiting said films. It has no branch office in West Virginia, and owns no property therein, with the exception of said films while they are in said State. The exhibitors must, under the terms of their licenses to exhibit said films, return same to the appellee, or one of its branches, or make shipment thereof to some other person as directed by appellee. The films are usually shipped by appellee from without the State, and are eventually returned to appellee without the State.

After the contract of license is entered into, appellee ships its films to the various exhibitors in the State of West Virginia, where they are received by said exhibitors, and then exhibited in their theaters for varying periods. The license provides that the exhibitor will pay the appellee for this right to so exhibit said films. These payments are sometimes fixed as a specified sum of money, and sometimes as a specified percentage of the receipts from theater admissions during the day or days when said picture is exhibited, in which case, said specified percentage of the receipts as payment for the license to so exhibit said films are designated as trust funds, and the exhibitor is made the trustee and collector thereof, and the same becomes the exclusive property of the appellee the moment paid into the box office.

Further reference to the stipulation and the contract of license governing the use and display of said films in West Virginia reveals the full extent of appellee's activities in West Virginia, as well as the great measure of control it exercises over the exhibition of said films therein, and the collection of rents and license fees therefor after the films have been received by the exhibitor or theater owner in West Virginia; and during the time same remain in said State.

**Points to be Relied Upon in Opposition to Motion to Affirm.**

POINT I.

Appellee is engaged in doing business in the State of West Virginia so as to be subject to the provisions of the taxing statute sought to be invoked.

POINT II.

Appellee is not engaged in interstate commerce relative to the local exhibition of its films in West Virginia, which is the sole activity sought to be taxed.

## Point III.

The tax sought to be imposed does not place an invalid burden upon interstate commerce, said commerce being purely incidental to a local activity in this State.

### Summary of Argument

I.

Appellee is doing business in West Virginia.

*Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, at page 516;

*Flint* v. *Stone Tracy Company*, 220 U. S. 107;

*Underwood Typewriter Co.* v. *Piggott*, 60 W. Va. 532;

*United Shoe Repairing Machine Co.* v. *Carney*, 116 W. Va. 224;

*United Shoe Machinery Co.* v. *United States*, 258 U. S. 451;

*Western Oil Co.* v. *Lipscomb*, 244 U. S. 346.

II.

Appellee is not engaged in interstate commerce relative to the activities sought to be taxed.

*Binderup* v. *Pathe*, 263 U. S. 291;

*United States* v. *Paramount Famous Lasky Corp.*, 34 F. (2d) 984, affirmed by this Court 282 U. S. 30;

*Paramount Pictures Distributing Co.* v. *Henneford*, 184 Wash. 376, certiorari denied 298 U. S. 665;

*General Railway Signal Co.* v. *Va.*, 246 U. S. 500;

*Browning* v. *Waycross*, 233 U. S. 16;

*N. Y. Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495;

*Paul* v. *Va.*, 8 Wall. 168.

III.

The tax is not an invalid burden upon interstate commerce.

*Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86;
*Hart Refineries* v. *Harmon*, 278 U. S. 499;
*Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, 288 U. S. 249;
*Henneford* v. *Silas Mason Co.*, 300 U. S. 577;
*Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366;
*Hughes Brothers Timber Co.* v. *Minn.*, 272 U. S. 469;
*Carson Petroleum Co.* v. *Vial*, 279 U. S. 95.

## ARGUMENT.

I.

### Appellee is Doing Business in West Virginia.

The question of whether or not a corporation or individual is doing business in a particular State so as to become amenable to taxation by that State depends upon the facts of each particular case, hence no set rule can be laid down as fully governing. As was said in the case of *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, at page 516: "It is evident, from what this Court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court." In that case certain realty corporations were engaged in handling tracts of land owned by such corporations, leasing and selling parcels thereof, disposing of stumpage, and seeing that their lessees under mining leases lived up to their contracts. The court there held that said corporations were engaged in business in the particular State within the meaning of an Act in said State imposing an excise tax measured by annual net income upon the doing or carrying on of business in a corporate or quasi-corporate capacity. This

question was also dealt with by this Court in the case of *Flint* v. *Stone Tracy Company*, 220 U. S. 107, wherein a tax was assessed upon the privilege of doing business in a corporate capacity. The Court held that one of the corporations engaged in the management and leasing of a hotel was engaged in doing business in the State, as well as was another which owned and leased ore lands for the purpose of carrying on mining operations and received therefor a royalty depending upon the quantity of ore mined. The court there said that the term "business" is "that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." These cases and those cited therein fully demonstrate that this Court has never laid down a strict or unbending rule by which to judge whether or not any certain activity comes within the term "doing business" within a particular State. It depends upon the facts in each case.

The appellee contending it is not doing business in West Virginia cites *Underwood Typewriter Co.* v. *Piggott*, 60 W. Va. 532, and *United Shoe Repairing Machine Co.* v. *Carney*, 116 W. Va. 224. It is respectfully submitted that these cases are not in point and hence do not control. The Piggott case merely involved the sale and delivery by a foreign corporation of typewriters in this State, upon orders taken therefor by its agents and traveling salesmen, and forwarded to it, *and involved no activity on the part of the foreign corporation after the goods had been received in West Virginia, and after interstate commerce had ceased.* The *Carney* case, *supra*, involved a Maine corporation which had licensed persons in West Virginia to use certain shoe machinery, for which the lessee paid the lessor certain rentals. The Court pointed out *that under the facts shown* the activities conducted by the Maine corporation in the State of West Virginia appeared to be purely of an interstate character, but further

observed that a foreign corporation does business within this State when it engages in corporate activities of a local character, which are wholly separate from interstate commerce, and said that the defendant's plea therein did not contain sufficient averments to show clearly that the corporation's business was of that character. The only allegations implying local transactions were that the agreement was entered into this State to use certain machines which were located within the State, and did not show in any way the extent of local activities. The facts in the instant case are entirely different and reveal a local activity much broader in scope and far reaching in effect.

The case of *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, cited by appellee, involved a monopolistic practice alleged to be in violation of the Clayton Act, and the decision in that case did not in any manner rest upon the doing of a purely local business within a State.

The case of *Western Oil Co.* v. *Lipscomb*, 244 U. S. 346, cited by appellee, merely involved the shipment by a foreign corporation into a State of certain merchandise to fill orders taken by its traveling salesmen, a case not at all comparable to the present one.

The activity which the State of West Virginia seeks to tax in the instant case is wholly disassociated from interstate commerce. When the films reach the State of West Virginia interstate commerce entirely ceases, and does not begin again until they are shipped out of said State. The State of West Virginia does not seek to tax any operation had in interstate commerce, but only that activity which is carried on locally. The distributors receive the films in West Virginia, open the packages, take the films therefrom and then exhibit the same upon their screens throughout the State, wholly local exhibitions. In so doing the value thereof is consumed at that particular place in said State, to the same effect for all practical purposes, as would be

in the case of the use of any perishable commodity. In and about doing this, and it is for this right to exhibit that the appellee is paid, the appellee exercises a marked degree of control and supervision over the use of said films while in West Virginia. Its representative spends approximately one-half of his time in this State to procure orders for these films, and, doubtless, in the course thereof sees to it generally that his principal's business and interests are taken care of. The appellee has on several occasions checked various theaters in said State relative to the amount of admissions paid, so as to determine whether or not it has been receiving its just share of the rentals for its pictures. The contract of license relative to the exhibition of its films in West Virginia, in cases where the same are licensed on a percentage basis, designates the exhibitor as a trustee of the funds coming into his hands from admissions which are to be paid to the appellee as a license fee for the exhibition thereof, and compels the exhibitor in West Virginia to set aside appellee's share of said admissions and to hold them separate and apart for appellee. The appellee has the right, for a period of one year after any exhibition, to examine the exhibitor's books and records for the purpose of verifying any statement as to receipts, where the picture is shown upon a percentage basis. The exhibitor in West Virginia, to a great measure, is subject at all times to the instructions of appellee relative to the disposition of the film while in West Virginia, and when the exhibition is concluded the exhibitor acts for the appellee in the return of said film or the shipment to some other party within or without this State. The exhibitor may exhibit a particular film for a period longer than that which is contracted for by securing from the appellee, while the film is in West Virginia, and without further shipment or movement thereof, permission so to do. A full inspection of the contract of license entered into in such cases, taken in con-

nection with the real purpose for which the film is used, undoubtedly reveals that its whole value, and that for which the appellee receives its rentals or fees is directly connected with and dependent upon the local exhibition of the film. That is the activity in which both parties are interested most vitally, and the activity in which the appellee exercises its most stringent control and supervision, all purely local in character, and most certainly a doing of a local business.

## II.

### Appellee is Not Engaged in Interstate Commerce Relative to the Activities Sought to be Taxed.

As heretofore pointed out, the position of appellant is to the effect that any interstate commerce, in whatsoever manner connected with the transactions here involved, is entirely disassociated from and purely incidental to the activity which the State of West Virginia seeks to tax. It is true that the mere taking of an order and the shipping into this State of an article, without further supervision or control over said article or its use in West Virginia, would be purely interstate commerce; however, when the films reach the exhibitors in West Virginia, interstate commerce ceases, and use from that point on up until they are shipped out of the State of West Virginia, if so, is a purely local use, and the local use of said films is that for which the appellee is paid; is that in which both parties are vitally and primarily interested. It is of no consequence as to how the exhibitor receives a film, whether in interstate commerce or intrastate commerce, as he well may do, but the whole use of the film and the entire activity sought to be taxed is the showing of that film in West Virginia. The tax is denominated as one imposed upon the collecting of incomes *from the use of real or personal property whether by lease, conveyance or otherwise, and whether*

*the return be in the form of rentals, royalties, fees, interests or otherwise.*

Counsel for appellee cite as authority for the argument that its business is wholly of an interstate character the cases of *Binderup* v. *Pathe*, 263 U. S. 291; *United States* v. *Paramount Famous Lasky Corp.*, 34 F. (2d) 984, affirmed by this Court 282 U. S. 30, and *Paramount Pictures Distributing Co.* v. *Henneford*, 184 Wash. 376, certiorari denied 298 U. S. 665. It is believed that a strict analysis of the holding of the courts in those cases clearly reveals that the principles there enunciated are not controlling as to the present question. The cases of *Binderup* v. *Pathe, supra,* and *United States* v. *Paramount Famous Lasky Corp., supra,* involved the question as to whether or not certain film distributors were engaged in unlawful practices in violation of the Sherman Anti-Trust Act. The question of their activities locally in the actual exhibition of the films was not passed upon, nor was it the subject of discussion. It is true that they are authority for the proposition that in the pure distribution of films they are engaged in interstate commerce, so as to become subject to the terms and conditions of the Sherman Anti-Trust Act, but their activities after distribution is completed, and when exhibition of the film begins is not the subject of discussion in said cases, and was not passed upon. The State of West Virginia is not presuming to tax the act of distribution, but seeks only to tax those activities carried on within the State, after actual distribution and interstate commerce has ceased.

It is well settled that a State is empowered to tax a local activity which is separate and distinct from the transportation and intercourse which is interstate commerce if the ordinary course of the business induces such interstate transportation. *General Railway Signal Co.* v. *Va.*, 246 U. S. 500, *Browning* v. *Waycross*, 233 U. S. 16, and that the mere formation of a contract between persons in different States

is not within the protection of the commerce clause. *N. Y. Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, *Paul* v. *Va.,* 8 Wall. 168.

## III.

### The Tax is Not an Invalid Burden Upon Interstate Commerce.

While it is true that the State cannot by a tax place a direct burden upon interstate commerce, it appears to be equally as true that a State may tax an activity of a local character, even though such tax may in a sense burden interstate commerce to some degree, where the tax is nondiscriminatory. In the case of *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, involving the tax upon motor vehicle fuel used or sold or otherwise disposed of within the State, the Court there held that the tax fell upon the local use of gasoline after interstate commerce had ended, just as the State of West Virginia asserts the right to tax the local use of the films based upon the receipts therefrom, after interstate commerce has ended. To the same effect is the case of *Hart Refineries* v. *Harmon,* 278 U. S. 499, and *Nashville, Chattanooga & St. Louis Railway* v. *Wallace,* 288 U. S. 249. See also the case of *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, holding valid a State tax on the use of personal property bought outside the State and shipped therein in interstate commerce. Where continuity of transit in interstate commerce has been broken, and the use to which property is put becomes local, the State may tax. *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366; *Hughes Brothers Timber Co.* v. *Minn.,* 272 U. S. 469; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95.

It is, therefore, respectfully submitted that appellee's motion to affirm should be denied, to the end that this Honorable

Court may note probable jurisdiction therein, and the case be then heard upon the merits thereof.

Respectfully submitted,

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# Supreme Court of the United States

OCTOBER TERM, 1938

## No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, *Appellant,*

v.

UNITED ARTISTS CORPORATION, A CORPORATION.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**BRIEF FOR APPELLANT**

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JARRETT PRINTING COMPANY — CHARLESTON, W. VA.

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# Supreme Court of the United States

OCTOBER TERM, 1938

## No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, *Appellant,*

v.

UNITED ARTISTS CORPORATION, A CORPORATION.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**BRIEF FOR APPELLANT**

### OPINION BELOW

The findings of fact, conclusions of law and opinion of the court below are contained in the record (R. 33-43), and reported in 23 Fed. Supp. 353.

### JURISDICTION

A statement as to jurisdiction has been filed and separately printed, pursuant to Rule 12, Paragraph 1, of this Court. It is not controverted that Section 238 of

the Judicial Code, as amended, confers jurisdiction upon this Court. Probable jurisdiction was noted on the 10th day of October, 1938.

## STATEMENT OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of West Virginia, rendered by a three judge court convened under the provisions of Section 266, amended, of the Judicial Code (28 USCA 380) (R. 31-33). The case involves the constitutionality and applicability of certain provisions of the West Virginia Business and Occupation Tax Law, as set forth in Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935, amending Chapter 11, Article 13, Code of West Virginia, 1931, as amended by Chapter 33, Article 13, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, as applied to the United Artists Corporation, a Delaware Corporation, having its cl. ef office in New York City, respecting certain activities engaged in by it in the State of West Virginia in and about the exhibition of its motion picture films therein.

The Act (*infra*, Appendix) imposes taxes at varying rates upon various businesses conducted within the State of West Virginia, the parts thereof here involved being Sections 2-(h) and 2-(i) imposing a tax of one per cent. (1%) (Section 2-[h]) (R. 6) upon every person engaged in this State in any service, business or calling not otherwise specifically taxed under this law, and (Section 2-[i]) (R. 6) upon every person engaging or continuing within this State in the business of collecting incomes from the use of real or personal property, or any interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interest or otherwise.

A contract typical of that under which appellee carries on its business is attached to the Bill of Complaint (R. 14A-14B), the terms of which are hereinafter detailed (*infra*, pp. 19-21).

Appellee brought this suit in equity to enjoin collection of the tax in question, claiming Federal jurisdiction because of diversity of citizenship; because the business and activities of appellee were conducted solely in interstate commerce, and hence, the tax sought to be levied and imposed would be an undue burden and hindrance upon said commerce, in violation of Section 8, Article I, of the Constitution of the United States; and because enforcement of the provisions of the Act would deprive appellee of its property without due process of law, and deny to it equal protection of the laws in contravention of the 5th and 14th Amendments to the Constitution of the United States (R. 12 and 13). Jurisdiction in equity was claimed because of the absence of an adequate remedy at law. Appellee applied for and insisted upon an interlocutory and permanent injunction. Appellant moved to dismiss the Bill of Complaint and filed an answer denying all material allegations of the bill, asserting that the tax in question was a valid and proper charge by the State. A stipulation of evidence was entered into and filed (R. 29-31).

## DISPOSITION OF CASE BY TRIAL COURT

The Court below determined that the necessary amount to give the District Court jurisdiction was involved; that appellee had no adequate remedy at law, and hence, a court of equity had jurisdiction of the issue; that appellee had never been and was not then engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or interest therein, whether by lease, conveyance or otherwise,

and whether the return be in the form of rents, royalties, fees, interest or otherwise; and that the acts of appellee in the carrying on of its business constituted "interstate commerce" (R. 41).

## FINDINGS OF FACT

The Court reviewed and summarized certain material facts appearing from the stipulation relative thereto which it considered important in relation to the discussion in the opinion of the Court (R. 33-41).

## FINAL JUDGMENT

The Court awarded a permanent injunction enjoining the enforcement of the statute in question against appellee (R. 31-33).

## STIPULATION OF EVIDENCE

The stipulation of evidence adopts as the facts of the case the allegations contained in the bill of complaint with certain modifications (R. 29-31). These facts may be summarized as follows:

Appellee is a corporation created and existing under the laws of the State of Delaware, having its principal office and chief place of business in the City of New York. It is a citizen and resident of the State of Delaware (R. 3). Appellant is the State Tax Commissioner of the State of West Virginia, and as such is charged with the duty of enforcing and administering the tax laws of that State (R. 3-4).

Appellee maintains branch offices in other cities in the United States, to-wit; Cleveland, Ohio, Pittsburgh, Pennsylvania, and Washington, D. C., but maintains no office in West Virginia. Its business in general is the soliciting of and having theater owners and exhibitors

in the State of West Virginia to exhibit its motion picture films in said State, and for which said exhibitions it receives certain fees, rentals or royalties. To accomplish these purposes, appellee from time to time makes public announcement of the motion pictures it has or will have for release. Theater owners or managers, who desire to exhibit such motion pictures, make written application in the form of an offer to appellee at its place of business in New York through a representative of appellee who spends approximately one-half of his employed time in West Virginia encouraging and soliciting theater owners and managers to exhibit appellee's films, said representative thus procuring the signatures of said theater owners and managers to said written applications (R. 4 and 30). Appellee, at its main office in the City of New York, rejects or accepts such applications and offers (R. 4).

A contract typical of that under which the activities of appellee are carried on is attached to and forms a part of the Bill of Complaint (R. 14A-14B). It provides that the motion picture films therein specified, or to be selected, will, at the time or times specified or provided for, be sent to the exhibitor by appellee, with the authorization to exhibit such films for a certain number of days fixed by the contract. The contract provides that for this right to exhibit such films, the exhibitor will pay appellee sometimes a specified sum of money fixed by the contract, and sometimes a specified percentage of the receipts from theater admissions during the day or days the picture is exhibited. Further provision is made therein that at the end of the exhibition period as specified, the exhibitor will, at the direction of appellee, ship the film or films by carrier designated by appellee to some other exhibitor, or return the same to appellee. During 1936, with two exceptions, the films of appellee exhibited in West Virginia were returned, pursuant to

the direction of appellee, to appellee outside West Virginia, the exceptions being occasions when an exhibitor within the State was directed by appellee to forward the film to another exhibitor within the State (R. 30). Upon receipt of the films of appellee from one of its branch offices without the State, or from another exhibitor within the State, they being sent by express, parcel post or other carrier, the exhibitor exhibits the same in ordinary motion picture theaters, and charges an admission fee to such of the public as desire to see the exhibition thereof (R. 5). When this use of the pictures is completed, they are, according to the contract, reshipped on advices given by appellee. The contract (R. 14A-14B) further provides that the exhibitor agrees to adhere in its newspaper advertising and publicity to the instructions issued to the exhibitor by appellee. The exhibitor agrees to charge as minimum admission to the theater for the exhibition of the films, certain prices for adults and children for matinees and after five p. m. certain other prices. *The right granted by this contract is to exhibit publicly the motion pictures and to reproduce publicly such recorded sound in synchronism therewith by the use of the positive print of the films delivered to the exhibitor by appellee.* When the fee to be paid by the exhibitor for the right to exhibit the films is to be computed upon a percentage basis, it is provided that such payment or part thereof shall be made to appellee at the end of each day's exhibition, together with a correct itemized statement of the gross receipts of the theate for admission thereto upon the exhibition date or dates of the motion picture for which payment is required, the same to be signed by the exhibitor, or his manager, and the exhibitor's cashier or treasurer. Appellee may require that such statement be made upon such forms as appellee may furnish to the exhibitor. On such date or dates, a representative of appellee is given the right to verify the

sale of all tickets of admission to said theater and the receipts therefrom, and for that purpose has access to the theater and the box office and also the right to examine the books and records of the exhibitor relating to such gross receipts. Appellee, or its representative, also has access, for a period of one year after the receipt by appellee of each final box office statement, to all the exhibitor's books and records for the purpose of verifying the exhibitor's statement. The exhibitor is further bound to segregate appellee's share of the gross receipts as the admission moneys are paid into the box office, and not to intermingle such funds with any other moneys, *and to hold such percentage share of such gross receipts in trust for appellee,* and to pay appellee such trust funds daily, such share of the gross receipts being and becoming the exclusive property of appellee from the moment the same is paid into the box office. During the year 1936, admissions to theaters in the State of West Virginia were checked by appellee on eight separate occasions (R. 30) for the purpose of ascertaining the receipts from theater admissions during the day or days when the pictures of appellee were being exhibited therein, to arrive at the correct amount due the appellee on a percentage basis for the privilege of exhibiting said films. These checks were made by an independent contractor acting for appellee (R. 30-31). The record does not disclose the number of occasions when appellee's films were exhibited in West Virginia on a percentage basis. The contract (R. 14A) provides that upon failure of the exhibitor to exhibit or pay for the exhibition when the use of the film is upon a flat fee basis, the fee therefor is to be the measure of damages the exhibitor will owe appellee for such failure, and in case the use is to be paid for upon a percentage basis, the exhibitor agrees to pay appellee as liquidated damages for each day for failure or refusal to exhibit the film a sum equal to such percentage of a cer-

tain daily average of the gross receipts of the theater, and a sworn statement of such daily gross receipts is to be furnished appellee by the exhibitor upon demand; that the exhibitor shall exhibit each picture in its entirety and shall not copy, duplicate, subrent or part with possession of any print thereof or mutilate the same, other than to make necessary repairs thereto, or when required by duly authorized public authority, or with the written or telegraphic consent of the appellee, the same to be returned in the same condition as received, reasonable wear only excepted; that if the exhibitor is granted, under the contract, a second or subsequent run, appellee has the right in its sole discretion to advance the exhibitor's run by giving notice in writing to such effect, whereupon the exhibitor is bound to exhibit such film in accordance with such notice, even though the exhibitor's run thus becomes a first run and there are no runs prior thereto; that if the exhibitor is granted thereunder a second or subsequent run, the exhibitor agrees not to advertise the film, except by means of advertisement inside his theater, not intended for removal therefrom by the public, prior to the exhibition of said film by any other exhibitor having the right to the first or prior run, and that violation of this clause subjects the exhibitor to pay appellee a sum equal to the damage caused the other exhibitor, and appellee may, at its option, terminate the right to exhibit the film; that exhibitor must adhere, in all newspaper advertising and publicity to the instructions of appellee; that exhibitor shall pay to appellee, upon demand, any tax, fee or other like charge imposed upon the delivery and/or the exhibition of the films and/or upon the sums payable under the license to so exhibit.

Appellee, conceiving the provisions of the taxing statute herein involved inapplicable to itself, has never made any estimates, reports or returns pursuant thereto, nor has it paid any tax thereunder. Appellant, however,

acting under the provisions of the statute and conceiving appellee to be liable for the payment of a tax of one per cent (1%) of the gross proceeds collected and received by appellee for the exhibition of its motion pictures in West Virginia, made an assessment, pursuant to the statute, for taxes due thereunder as of October 1, 1936, in the amount of Four Thousand Four Hundred and Two Dollars and Nineteen Cents ($4,402.19), and has demanded that appellee pay said sum, and further pay a like tax upon such gross proceeds after October 1, 1936, and has threatened to undertake to enforce the collection of the tax so assessed with accrued penalties and those to accrue, by bringing against appellee actions at law in the counties in which appellee's films are being shown, or will be shown, and sue out attachments and make the exhibitors of appellee's films garnishees thereunder, and to distrain appellee's films in the possession of exhibitors in the State, and to institute suits in chancery in the courts of the counties of West Virginia wherein appellee's films are shown to enjoin the further showing thereof until full payment shall be made of all taxes and penalties due from appellee (R. 10-11).

## SPECIFICATIONS OF ERRORS RELIED UPON

Appellant will rely upon the assignment of errors filed with the petition for appeal (R. 47-49), and upon the statement of points to be relied upon set forth in the statement under Rule 13, Paragraph 9 (R. 51-52), the same being as follows:

## ASSIGNMENT OF ERRORS

1. The court erred in holding, as a conclusion of law, that the State of West Virginia has no power to impose upon and collect from the appellee the West Virginia Business and Occupation Tax (Sections 2-[h] and 2-[i],

Article 13, Chapter 11, Code of West Virginia, as amended by Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, and Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935), with respect to gross income received by it from exhibitors of its films in West Virginia, on account of the exhibition thereof in said State, for the reason that the appellee never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interests or otherwise.

2. The court erred in holding, as a conclusion of law, that the State of West Virginia has no power to impose upon and collect from the appellee the West Virginia Business and Occupation Tax (Sections 2-[h] and 2-[i], Article 13, Chapter 11, Code of West Virginia, as amended by Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, and Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935), with respect to gross income received by it from exhibitors of its films in West Virginia, on account of the exhibition thereof in said State, for the reason that the acts of the plaintiff, in and about the exhibition of its films in West Virginia, and the receiving of moneys therefor, constitute "Interstate Commerce".

3. The court erred in awarding the permanent injunction prayed for in the bill of complaint.

## STATEMENT OF POINTS TO BE RELIED UPON

### POINT I.

Appellee is engaged within the State of West Virginia in the business of collecting incomes from the use of real

or personal property, or an interest therein, whether by lease, conveyance or otherwise, and whether the returns be in the form of rents, royalties, fees, interests or otherwise.

## POINT II.

The business of the appellee in the State of West Virginia is purely local and intra-state, any interstate character of appellee's business having ceased when its films arrived in West Virginia, and the package in which they were contained was broken so that thereafter the use of said films and the income derived therefrom in the State of West Virginia is a purely intra-state activity and hence taxable by said State.

## POINT III.

Any part of appellee's activities with respect to its business in West Virginia, in the exhibition of its films, which might be said to be in interstate commerce is purely incidental to the local performance of its activities in West Virginia. That for which the appellee received its rentals and fees was an activity purely local in character, carried on entirely within the State of West Virginia.

## SUMMARY OF ARGUMENT

### I.

Aside from any connection with interstate commerce, appellee is doing business in West Virginia.

*Flint* v. *Stone Tracy Co.*, 220 U. S. 107;

*Von Baumbach* v. *Sargent Land Company*, 242 U. S. 503;

*Chemung Iron Co.* v *Lynch*, 269 Fed. 368;

*International Harvester Co.* v. *Kentucky*, 234 U. S. 579;

*Cone* v. *New Britain Mach. Co.*, 20 F. (2d) 593;

*Mandel Bros.* v. *Henry A. O'Neil, Inc.*, 69 F. (2d) 452;

*Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143;

*Rex Beach Pictures Co.* v. *Harry I. Garson Productions*, 209 Mich. 692;

*Short Films Syndicate Co.* v. *Standard Film Service Co.*, 39 Ohio App. 79;

*Laurentide Co.* v. *Durey*, 231 Fed. 223;

*United States* v. *Interstate Circuit*, 20 F. Supp. 868.

II.

For purposes of Federal regulation or supervision, the activity sought to be taxed may be considered interstate in character, yet that presents no obstacle to the power of West Virginia to tax this activity purely local in character.

*Swift & Co.* v. *United States*, 196 U. S. 375;

*Stafford* v. *Wallace*, 258 U. S. 495;

*Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169;

*Minnesota* v. *Blasius*, 290 U. S. 1;

*Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17;

*Binderup* v. *Pathe Exchange*, 263 U. S. 291;

*Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604;

*Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250;

*Bacon* v. *Illinois*, 227 U. S. 504;

*United States* v. *Interstate Circuit*, 20 F. Supp. 868.

## III.

The exhibition of appellee's films in West Virginia is a purely local activity, subject to a nondiscriminatory tax by the State. Any resultant burden on interstate commerce is indirect and incidental.

*Bacon* v. *Illinois*, 227 U. S. 504;

*American Steel & Wire Co.* v. *Speed*, 192 U. S. 500;

*Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82;

*Browning* v. *Waycross*, 233 U. S. 16;

*Minnesota* v. *Blasius*, 290 U. S. 1;

*General Railway Signal Co.* v. *Virginia*, 246 U. S. 500;

*Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169;

*Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17;

*Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165;

*Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604;

*Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250;

*J. D. Adams Manufacturing Co.* v. *Storen*, ____ U. S. ____; 82 L. Ed. 870;

*East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465;

*Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148;

*Public Utilities Commission* v. *Landon*, 249 U. S. 236;

*Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298;

*Mutual Film Co.* v. *Industrial Commission of Ohio*, 215 Fed. 138;

*Mutual Film Corp.* v. *Industrial Commission of Ohio*, 236 U. S. 230;

*Mutual Film Corp.* v. *Hodges*, 236 U. S. 248;

*Fox Film Corp.* v. *Trumbull*, 7 F. (2d) 715;

*Boynton* v. *Fox West Coast Theatres Corp.*, 60 F. (2d) 851;

*United States* v. *Interstate Circuit*, 20 F. Supp. 868;

*Eureka Productions, Inc.* v. *Lehman*, 17 F. Supp. 259;
Motion to affirm granted 302 U. S. 634;

*Paul* v. *Virginia*, 8 Wall. 168;

*New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495;

*Sonneborn Bros.* v. *Keeling*, 262 U. S. 506.

## ARGUMENT

### I.

### ASIDE FROM ANY CONNECTION WITH INTERSTATE COMMERCE, APPELLEE IS DOING BUSINESS IN WEST VIRGINIA.

It was contended, and the lower Court concluded as a matter of law, that appellee had never been and was not then engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees or otherwise (R. 41), so as to be subject to the tax imposed by the West Virginia statute upon persons engaged within that State in such business. While it is thought that the question of whether or not the activities of appellee in West Virginia are taxable by said State is so closely related to and a part of the question of whether or not such activities are a part of interstate commerce, so as to make the same a proper subject for discussion in that respect only, it is believed that a discussion of the question of "doing business", in view of the conclusion of the lower Court, should be had without reference to any phase of interstate commerce which might be involved, such to be discussed in detail later.

As was pointed out in *United States* v. *Interstate Circuit*, 20 F. Supp. 868, a film without the right of exhibition would be useless in either intra or inter state economics. It is, of course, realized that many things are done to make possible the exhibition of a film, but in the last analysis the exhibition thereof is that for which all other efforts are expended. The only value of a motion picture film is its value for exhibition purposes. It is reasonable to say, therefore, that that which is of value is

that in which the owner thereof naturally is most interested, and which, in the ordinary course of events, he desires to protect and reap the maximum benefit for himself therefrom.

"Business" and "doing business" are comprehensive terms. This Court, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, observed that such embraces everything about which a person can be employed, and is that which occupies the time, attention and labor of men for livelihood or profit. It was further pointed out in *Von Baumbach* v. *Sargent Land Company*, 242 U. S. 503, at page 516, that, "It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court"; and in *Short Films Syndicate Co.* v. *Standard Film Service Co.*, 39 Ohio App. 79, it was held that the question of doing business within a particular State is not a question of law, but a question of fact, and that each case must rest upon its own facts. So, looking to the facts of some of the adjudications on this subject, we find in *Von Baumbach* v. *Sargent Land Company, supra*, the Court holding that certain realty companies engaged in handling tracts of land owned by them; leasing and selling parcels thereof; disposing of stumpage and seeing that their lessees under mining leases lived up to their contracts, were doing business in the particular State, so as to be subject to an act of that State imposing an excise tax, measured by annual net income, for the privilege of doing or carrying on business in a corporate capacity.

In *Flint* v. *Stone Tracy Co., supra*, wherein a tax was assessed for the privilege of doing business in a corporate capacity, the Court held that corporations engaged in the activity of leasing a hotel; that another which owned and leased ore lands for the purpose of carrying on mining operations and received therefor a royalty depending

upon the quantity of ore mined; and another owning and leasing taxi-cabs and collecting rents therefrom, were doing business in the State within the meaning of the statute. In *Chemung Iron Co.* v. *Lynch*, 269 Fed. 368, a company which sub-leased ore lands for mining purposes and received a royalty therefrom, and which employed an engineer to supervise the work of the lessee, and expended money to ascertain that all the ore was taken from its lands, was held to be doing business within the particular State, so as to subject it to the corporation tax act of that State. The case of *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, holds that a non-resident company, by continuous solicitation through local agents of orders which were sent to the company out of the State for articles which were then delivered within the State where the orders were given, and where such agents had authority to receive the payments therefor and to take notes payable at banks in the State, was doing business in said State to the extent that the company was amenable to the process of that State by service thereof upon its agents. In *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143, a two per cent privilege tax upon the gross premiums from business done in that State was held valid, although the company was not a resident of the State, it, however, having a large number of policy holders therein who paid their premiums to the company at its office without the State, the company thus "doing business" in the State. The Court pointed out that many incidents of the contract were likely to be attended to in Pennsylvania, such as the payment of dividends when received in cash, sending an adjuster into the State in case of dispute and in making proofs of death. In *Rex Beach Pictures Co.* v. *Harry I. Garson Productions*, 209 Mich. 692, certain rights being in dispute under a contract and subcontract for the renting and distribution of a certain motion picture, not unlike the present contract, the ques-

tion arose as to whether or not the owner of the film, a non-resident of the State, was doing business therein. The Court pointed out that all bookings of the films were to be approved in writing by the owner, and were not effective until so approved, and that all funds derived from the rentals of the picture were to be regarded as trust funds in the hands of the collector thereof. The Court in holding that the film owner was "doing business" in the State, observed that the agreement by its terms was an invasion of the State by a foreign corporation, not simply for the purpose of making sales of products manufactured and delivered in a foreign State, nor was it a single act of business without intent or purpose to do any other business, but was "for the express purpose of extending and establishing its business permanently within the State." *Laurentide Co. v. Durey*, 231 Fed. 223, involved the question of whether or not a Canadian corporation was subject to the revenue act taxing the net income of foreign corporations engaged in business in the United States. The Court, in holding that the foreign corporation was engaged in such business pointed out that although it was true some of the business connected with its transactions was to be done in Canada, that all the conditions of the contracts were not to be complied with there, in that, most of them and in fact the most important ones, were to be performed in the United States. These cases are merely illustrative of the wide variety of facts and circumstances which have been taken into consideration with respect to the question of whether or not "business" was being done within a State.

So, reverting to the broad principle that "business" embraces everything about which a person can be employed and is that which occupies the time, attention and labor of men for the purpose of livelihood or profit, and that each particular case must be judged upon the

facts thereof, may we examine the facts here involved? The appellee is a foreign corporation. What are its activities in West Virginia, if any? It cannot be denied that it is vitally interested in the exhibition of its films. Its films are valueless except for exhibition purposes. The fruit of all its efforts is the local exhibition in West Virginia. Its general activities are described in the bill of complaint (R. 3-14) as limited by the stipulation of facts (R. 29-31). However, to best judge its powers, rights and activities in West Virginia, the typical contract under which it operates filed with the bill of complaint (R. 14A-14B), will more clearly detail to the Court the extent of its operations in this State. A representative of appellee spends approximately one-half his employed time in West Virginia encouraging and soliciting theater owners and managers to exhibit appellee's films, and procures the signatures of said owners and managers to the written contracts for said films (R. 4 and 30). Section "Third (b)" of the contract (R. 14A) provides that if the film is to be exhibited upon a percentage basis, payment therefor to appellee is to be made at the end of each day's exhibition, together with a correct itemized statement of the gross receipts of the theater, said statement to be made on forms furnished by appellee, if so required. Appellee thereunder is given the right to verify the sale of tickets and receipts, and for that purpose is given access to the theater and box office, with the right to examine the exhibitor's books and records relating thereto. Further right is therein granted appellee, or its representative, of access for a period of one year thereafter to all the exhibitor's books and records, and where an exhibition is on a percentage basis, appellee's share of the gross receipts paid into the box office are made trust funds, and the exhibitor is the trustee of appellee for such, said funds to be paid over daily and not to be commingled with any other moneys, the same to be the ex-

clusive property of appellee the moment paid into the box office. Thus appellee through its trustee is doubtless ever present in West Virginia collecting its income from such exhibitions. Section "Fourth" of the contract (R. 14A) provides for liquidated damages due appellee upon the failure of the exhibitor to exhibit its films. Section "Seventh" of the contract (R. 14A-14B) gives to appellee wide powers relating to the designation of the times for the actual exhibition of its films. Section "Eighth (a)" thereof (R. 14B) leaves the return or disposal of the film after exhibition entirely within the hands of appellee. In other words, the films having once reached their destination in West Virginia and having been exhibited, are solely at the disposal of appellee. Section "Tenth" thereof (R. 14B) gives appellee wide and sole power relative to the change of any picture specified in the contract as to story, book or play, adaptation thereof or the cost thereof. Section "Twelfth" (R. 14B) gives appellee the sole right to advance exhibitor's run of the picture in case the exhibitor is granted a second or subsequent run thereof. Section "Thirteenth" (R. 14B) limits the manner in which the exhibitor may advertise a second or subsequent run of a picture. Section "Fourteenth" (R. 14B) makes the exhibitor liable to appellee for any taxes appellee may have to pay by reason of the delivery, exhibition, etc. of the picture. If the contentions of the appellee are correct in this case, this provision is mere surplusage. Evidently some consideration was given to the likelihood of a tax having to be paid by appellee. Section "Sixteenth-10" binds the exhibitor to adhere in its newspaper advertising and publicity relative to the exhibition of the film to the instructions issued by appellee. It certainly must be recognized that the advertisement of the local exhibition of films is a vital force respecting the success or failure thereof. Appellee can completely control this. The same

section binds the exhibitor to charge certain minimum admissions for adults and children for matinees and for the same class of customers after five o'clock p. m.; thus giving appellee the very potent power to prescribe to a great degree what charge can eventually be made by exhibitor for the right of the public to view the exhibition. One, upon reading the contract in its entirety, is immediately struck with the lack of mutuality therein, in that, every advantage relative to the exhibition of the films is given appellee without corresponding advantages being granted to the exhibitors. Mutuality in the contract is conspicuous by its absence. Appellee, by contract, has reserved to itself unilateral control and supervision of that which is of greatest value to it, namely, the exhibition of the film.

So, entirely aside from the question of interstate commerce in this case, do not the facts concerning the activities of appellee in West Virginia more than amply show the doing of business in this State? Surely, a person so vitally interested in an activity within a State, the same constituting a continuous course of business therein, is as a matter of fact doing business in that State. The exhibition of the film is the thing. It is not merely a small part of some larger activity, but it is the fruition and culmination of all other activities which are merely incidental thereto including interstate commerce to whatever extent involved.

Appellee, in the lower Court and in its motion to affirm, cited two West Virginia cases: *Underwood Typewriter Co.* v. *Piggott*, 60 W. Va. 532, and *United Shoe Repairing Machine Company* v. *Carney*, 116 W. Va. 224, as authority for the proposition that it is not doing business in this State. In our judgment these cases are not in point, and do not control. *Underwood Typewriter Co.* v. *Piggott*,

*supra,* merely involved the sale and delivery, by a foreign corporation, of typewriters in this State upon orders taken therefor by its agents and traveling salesmen, and forwarded to it. No activity on the part of the foreign corporation after the goods had been received in West Virginia and after interstate commerce had ceased, was involved. There was no provision for or attempted exercise of control and authority on the part of the seller after the goods were in West Virginia, hence the case is not comparable to the present one. *United Shoe Repairing Machine Co.* v. *Carney, supra,* involved a Maine corporation which had licensed persons in West Virginia to use certain shoe machinery for which the lessees paid the lessor certain rentals. The Supreme Court of West Virginia pointed out that *under the facts shown,* the activities of the Maine corporation were purely of an interstate character, but very pertinently observed that a foreign corporation does business within this State when it engages in corporate activities of a local character wholly separable from interstate commerce, and at page 227 said: "The only allegations implying that defendant's transactions with plaintiff were local are that he entered into an agreement with it at Huntington to use certain machines which were located within the State. The plea can not be extended any by presumption, since the law supposes that defendant stated his case most favorably to his contention." Of course, under such a meager showing of facts, it could not be successfully contended that the corporation was doing business in the State of West Virginia, but how different are the facts therein from the facts here involved. Another case relied upon by appellee on this point is that of *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451. This case involved a practice alleged to be in violation of the Clayton Act, and the decision in that case did not in any manner rest upon the doing of a purely local business within the State.

## II.

## FOR PURPOSES OF FEDERAL REGULATION OR SUPERVISION THE ACTIVITY SOUGHT TO BE TAXED MAY BE CONSIDERED INTERSTATE IN CHARACTER, YET THAT PRESENTS NO OBSTACLE TO THE POWER OF WEST VIRGINIA TO TAX THIS ACTIVITY PURELY LOCAL IN CHARACTER.

Conceiving that the question of taxability by the State of the activities of appellee in West Virginia in the last analysis depends upon whether or not such activities are a part or parcel of interstate commerce to the extent that State authority cannot be asserted or exercised relative thereto, and because of the great reliance by counsel for appellee and by the lower court on the case of *Binderup* v. *Pathe Exchange*, 263 U. S. 291, and the application of the principles therein announced in the cases of *State* v. *Paramount Publix Corporation*, 178 La. 818, and *Paramount Pictures Distributing Co.* v. *Henneford*, 51 P. (2d) 385, certiorari denied 298 U. S. 665, we deem it well to point out that for purposes of Federal regulation or supervision an activity may be considered to be interstate commerce, but by reason of that fact it does not necessarily follow that the activity or a part thereof is not subject to State regulation and taxation. We do not seek to detract from the force of the principles announced in the *Binderup case*. This Court there held that a distributor of motion picture films under contracts comparable to the one at bar was engaged in interstate commerce, so as to be subject to Federal regulation under the Anti-trust Act. The activities there considered were those involving pure distribution of the films to a distributor in the State of Nebraska, who thereafter distributed them in that State for local exhibition, and the Court did not consider, it being unnecessary for its de-

cision, any activity relating to the actual exhibition of the films. The Court, however, very pertinently observed, at page 311: "The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, *are of little value to the inquiry here.* It does not follow that, because a thing is subject to State taxation, it is also immune from Federal regulation under the commerce clause." (Italics ours.)

To us the Court thus clearly indicates that although the distribution within the State, and the business of exhibiting films therein, might well be subject to Federal regulation under the Anti-trust Act or some other Federal Act, such does not mean that the State could not exercise control over such local activity. This Court further stated in *Stafford* v. *Wallace,* 258 U. S. 495, at page 525, in quoting from the case of *Swift & Co.* v. *United States,* 196 U. S. 375: " 'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress where such interference is deemed necessary for the protection of commerce among the States'." So, all the incidents which might constitute an essential part of interstate commerce with respect to whether or not the same might be regulated in some manner by the Federal Government, are not thus necessarily and as a practical matter of taxation themselves removed from the field of State taxation. As was said by this Court in *Wiloil Corporation* v. *Pennsylvania,* 294 U. S. 169, at page 175, in holding that a State excise tax imposed on each gallon of liquid fuel used or sold by distributors in the State of Pennsylvania, the same having been purchased outside that State and brought into the State in interstate commerce, was not an invalid burden on interstate Commerce: "We need not consider whether deliveries to purchasers ended the interstate commerce involved including all incidents that in other connections

might constitute an essential part of that which is covered by the commerce clause."

Even interstate commerce must pay its way, and the bare fact that one is carrying on a business which may be designated as interstate commerce in some respects does not necessarily relieve him of the many forms of State taxation which might add to the cost of his business. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250. It is only when the taxing power of the State presents an obstacle to, or may we say places a direct burden upon interstate commerce, that the tax is invalid. In *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, at page 23, it was said: "The mere extension of control over a business by the National Government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

It is our contention that the exhibition of the films is purely local; that so far as the power of State taxation is concerned, they have come to rest within the State and have acquired a situs therein. Surely it would not be contended that the films are not subject to a property tax, as was considered in *Bacon* v. *Illinois*, 227 U. S. 504. But even in this condition, and with respect to their exhibition, they might properly be considered as a part of interstate commerce so as to permit regulation under the Anti-trust Act as was pointed out in *United States* v. *Interstate Circuit*, 20 F. Supp. 868, at page 873:

> "While it is doubtless true that the exhibition, itself, of the moving picture is state commerce, and beyond the finger of regulation as interstate commerce, it is also true that the film without the right of exhibition would be useless in either intra or inter state economics. Therefore, a contract made in violation of the national anti-trust laws may not be unchallenged because the last step in its fruition is intra-state in character. This is not

placing the finger of the national government into the affairs of the state. It is saving national authority from paralysis, when the authority operates upon that which fruits at the end of an interstate trip. * * *"

Hence, merely because there is a flow of interstate commerce which is subject to the regulating power of Congress, it does not necessarily follow that in the absence of a conflict with the exercise of that regulatory power by Congress, a State may not lay a nondiscriminatory tax with respect to a local activity connected therewith. *Minnesota* v. *Blasius*, 290 U. S. 1.

Upon the above authority, we believe that although in the instant case it may well be that for certain purposes of Federal regulation the activities sought to be taxed in this particular case might be considered interstate in character, yet that presents no obstable to the power of the State of West Virginia to tax this activity of a purely local character. It is carried on in this State, after interstate commerce as a practical matter has ended. Coextensive Federal and State authority is permissible, as well as being highly desirable at times.

## III.

## THE EXHIBITION OF APPELLEE'S FILMS IN WEST VIRGINIA IS A PURELY LOCAL ACTIVITY, SUBJECT TO A NONDISCRIMINATORY TAX BY THE STATE. ANY RESULTANT BURDEN ON INTERSTATE COMMERCE IS INDIRECT AND INCIDENTAL.

### A. The Mere Formation of the Contract Does not Place Appellee's Activities Within the Protection of the Commerce Clause.

The contracts under which appellee's activities are carried on in West Virginia are, of course, between citi-

zens of different States, and finally consummated in New York. However, that does not serve to place its activities within the protection of the commerce clause so as to prevent State taxation, if otherwise permissible. This Court, in *Paul* v. *Virginia*, 8 Wall. 168, and in *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, recognized this principle, and citing these two cases in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, said: "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of congressional action, unless the performance is within its protection, is a proposition no longer open to question." We know of no congressional action with reference to the activities of appellee here, and, therefore, assume that the principle as stated is applicable in this case.

**B. The Exhibition of Appellee's Films in West Virginia is a Purely Local Activity, Interstate Transportation Being Merely Incidental Thereto.**

It is our view that interstate commerce is related only incidentally to the exhibition of appellee's films in West Virginia, in that, interstate transportation is merely induced or occasioned by the local exhibition. In Point I of our argument, (pp. 15-22, *supra*), we discussed in detail appellee's local activities, which, as said by the Court in *United States* v. *Interstate Circuit*, 20 F. Supp. 868, were the fruition of all its efforts. It is true that the films themselves may move in interstate commerce so as to be available for exhibition, but the exhibition itself is that which induced or occasioned interstate transportation. As brought out in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, the events upon which the tax is conditioned occur in West Virginia and not elsewhere. In *Browning* v. *Waycross*, 233 U. S. 16, the question arose as to whether or not carrying on the business of erecting

lightning rods in the State was interstate commerce beyond the power of the State to regulate or directly burden, the contract therefor being entered into by parties of different States, and the performance thereof requiring the shipment of the rods in interstate commerce. The Court pointed out that the affixing of the lightning rods to houses was carrying on a business of a strictly local character, peculiarly within the exclusive control of State authority, and was a business wholly separate from interstate commerce, and did not involve a question of the delivery of property shipped in interstate commerce, or the right to complete an interstate commerce transaction, but concerned the doing of a local act after interstate commerce had completely terminated, hence the State might tax the same. See also *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500. In *East Ohio Gas Co.* v. *Tax Commission of Ohio,* 283 U. S. 465, a State excise tax had been imposed upon a corporation engaged in supplying natural gas to consumers within the State, based upon the gross receipts from the sale of gas piped from other States. In considering the question of whether or not the business carried on in the State was interstate commerce, the Court said at page 470:

> "The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that state. * * * But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny

> streams that enter the small service lines, connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. * * *"

The Court, after citing several cases, continued at page 471:

> "* * * It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state."

We fail to see any great difference as to principle in that case and the one at bar. Here the films are shipped into West Virginia in compact, highly concentrated masses by interstate transmission, just as the gas was brought into the State in the above case, but with the completion of that movement the films are taken from their containers, put into projection machines in the State of West Virginia and there flashed upon the screens, whereby their stored up value is minutely broken down and divided so that it may be received by the many thousands of people who view these exhibitions. Is there any great difference between this and the activity in the above case where the volume of gas brought into the State in interstate commerce is expanded, treated and divided into many thousand relatively tiny streams, whereby the once concentrated mass of gas is made available to the thousands of commercial users thereof. We submit that the two cases are entirely comparable, and that the business

of exhibiting these films in West Virginia is as much a breaking of the original package after shipment in interstate commerce as could possibly be contemplated in any case. Substantially to the same effect are the cases of *Public Utilities Commission* v. *Landon*, 249 U. S. 236, where, at page 245, it was said: "Interstate movement [of natural gas being transported from State to State] ended when the gas passed into local mains"; and *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, the Court saying at page 308:

> "With the delivery of the gas [transported from one State to another State] to the distributing companies * * * the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. * * *
>
> "* * * The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies."

See also *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148.

We believe, moreover, that this Court has passed upon the specific question here involved, and has held that the exhibition of films in a State is a purely local act, to which interstate transportation is only incidental. In *Mutual Film Co.* v. *Industrial Commission of Ohio*, 215 Fed. 138, wherein an activity was carried on similar in almost every respect to that being considered, the Court said, at page 145:

> "It is claimed that the statute violates the commerce clause. Substantially all the films supplied

by complainants are manufactured outside the state of Ohio. The films are brought into the state in shipping packages containing one or more tin boxes in each of which is a film wrapped on a core. When the packages reach their destination in the state, they are opened and the films taken off the shipping cores and put on reels, and then placed in the stock of an exchange. The reels are then distributed among the exhibitors and passed from one to another for purposes of public exhibition. Some of these films circulate wholly within Ohio until worn out, while some remain there only for brief periods. It is to the films so placed on reels that the statute applies. The statute in terms limits the duty of the board of censors to examination of 'all motion picture films to be publicly exhibited and displayed in the state of Ohio.' They must be submitted to the board before they are delivered to exhibitors for exhibition, and the fees charged are fixed by uniform rates according to the length of 'each reel of film.' Section 3 of Act, supra. We are therefore not concerned with shipping packages which pass into and out of the state in their original form. It cannot be said that the act imposes any sort of burden upon the original shipping packages; for, when the packages are broken and their contents placed upon reels, the films have lost their distinctive character as articles of interstate commerce."

This Court affirmed that decision in *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, and said, at pages 240 and 241:

"* * * It is true that, according to the allegations of the bill, some of the films of complainant are shipped from Detroit, Michigan, but they are distributed to exhibitors, purchasers, renters, and lessors in Ohio, for exhibition in Ohio, and this determines the application of the statute. In other

> words, it is only films which are 'to be publicly exhibited and displayed in the state of Ohio' which are required to be examined and censored. It would be straining the doctrine of original packages to say that the films retain that form and composition even when unrolling and exhibiting to audiences, or, being ready for renting for the purpose of exhibition within the state, could not be disclosed to the state officers. If this be so, whatever the power of the state to prevent the exhibition of films not approved,—and for the purpose of this contention we must assume the power is otherwise plenary,—films brought from another state, and only because so brought, would be exempt from the power, and films made in the state would be subject to it. There must be some time when the films are subject to the law of the state, and necessarily when they are in the hands of the exchanges, ready to be rented to exhibitors, or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the state."

Of like effect are the following cases where activities were being carried on under contracts similar to that in the instant case: *Mutual Film Corp.* v. *Hodges*, 236 U. S. 248; *Fox Film Corp.* v. *Trumbull*, 7 F. (2d) 715; *Boynton* v. *Fox West Coast Theatres Corp.*, 60 F. (2d) 851.

The Court observed that it is doubtless true that the exhibition itself of moving pictures is State commerce, and said in *Eureka Productions* v. *Lehman*, 17 F. Supp. 259, (motion to affirm granted 302 U. S. 634), at page 261:

> "We cannot accept the argument that the character of foreign commerce persists through the exhibition of the film in the state after its arrival. If, after a film passes in interstate commerce into a second state for exhibition, the regulatory laws of that second state are enforceable, we think the

same applies to a foreign film after its arrival and readiness for distribution and exhibition."

The same principles above discussed seem to apply with equal force to an activity local in character which takes place before interstate transportation begins. In *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, a case involving a State license tax on the generation of electricity, which electricity was transmitted to consumers in another State, the following question in the words of the Court was presented, page 178:

> "* * * Upon the facts of the present case is the generation of electrical energy, like manufacture or production generally, a process essentially local in character and complete in itself; or is it so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce?"

The Court, pointing out that taxation is a practical matter, and that which constitutes commerce, manufacture or production is to be determined upon practical considerations, said at page 180:

> "We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce. * * *"

and at page 182:

> "Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. So far as it produces electrical energy in Idaho, its business is purely intra-state, subject to state taxation and

> control. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal Constitution * * *"

See also *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17.

The test of the power of a State to tax or regulate where interstate commerce is concerned is well stated in *Mandel Bros.* v. *Henry A. O'Neil, Inc.*, 69 F. (2d) 452, at page 455, the Court saying:

> "The test is whether the business done in the state of destination involves a 'question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction,' or whether it concerns 'merely the doing of a local act after interstate commerce had completely terminated.'"

We submit that the business of appellee sought to be taxed in the instant case is purely of the latter character.

**C. Any Resultant Burden of the Tax Falls Only Remotely and Incidentally on Interstate Commerce, Hence Valid.**

In *Sonneborn Bros.* v. *Keeling*, 262 U. S. 506, at page 510, Chief Justice Taft, speaking for the Court, stated:

> "* * * The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article, because of its relation to interstate commerce, depends on the question whether the tax challenged regulates or burdens interstate commerce."

It appears that a State may, to some degree, affect or burden interstate commerce, and it is only when that burden is direct and substantial that the same is invalid. Even interstate business must pay its way, and it is not

the purpose of the commerce clause to relieve those engaged in a form of interstate commerce from their just share of the State tax burden, even though it might increase their cost of business. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Browning* v. *Waycross*, 233 U. S. 16: *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165. Here, the tax falls alike on all those engaged in interstate or intra-state commerce, or both. It is nondiscriminatory. Nothing in the contract requires or necessarily involves transportation across the State boundary. In *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, the Court observed at page 174:

> "These contracts did not require or necessarily involve transportation across the state boundary. * * * There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. * * *"

> "* * * As interstate transportation was not required or contemplated, it may be deemed as merely incidental. * * * The act lays no burden on interstate commerce as such and, if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources. * * *"

In *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, the Court said:

> "* * * The language of the state statute makes it quite certain that this privilege tax falls alike on

> those engaged in interstate or in intrastate commerce, or in both. While a privilege tax by a state for engaging in interstate business has frequently met the condemnation of this Court as a regulation of commerce, privilege taxes for 'carrying on a local business,' even though measured by interstate business, have been sustained. * * * The present case falls well within the line of state tax authority."

The exemption of those engaged in interstate commerce from the taxation others bear is not to be extended beyond the necessity of keeping that commerce free from unwarranted interference. The West Virginia statute does not attempt to legislate respecting importation of films into this State brought from outside the State. In *Fox Film Corp.* v. *Trumbull*, 7 F. (2d) 715, the Court said at page 723:

> "* * * The statute does not in terms legislate respecting importations into Connecticut of films brought from outside the state. It operates alike on films brought into the state and those produced in the state. It does not prohibit the bringing into the state of such films or prohibit or regulate the sale of such films. It is concerned only with the public exhibition of moving pictures within the state. Whatever burden or restriction the law imposes is purely incidental in so far as interstate commerce is concerned."

In *Boynton* v. *Fox West Coast Theatres Corp.*, 60 F. (2d) 851, the Court said, at page 853:

> "* * * It is our opinion that section 21-952, supra, by prohibiting the exhibition of such films on Sunday at theatres in Kansas, when they have come to rest in such state for the purpose of being exhibited by lessees thereof at such theatres, does not regu-

late or impose a direct burden on interstate commerce. * * *"

Where interstate movement has ended and local activity has begun, the local interest is paramount, and the tax upon this activity does not unlawfully burden interstate commerce, as was said by the Court in *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465, quoting from *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298:

> "'With the delivery of the gas [transported from one state to another] to the distributing companies * * * the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. * * * In such case the effect on interstate commerce, if there be any, is indirect and incidental * * *. The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.'"

See also *Eureka Productions, Inc.* v. *Lehman*, 17 F. Supp. 259.

**D. The West Virginia Tax is Not One Which In Form or Substance Can Be Repeated by Other States in Such a Manner as to Lay an Added Burden on Interstate Commerce.**

The tax, by its wording and operation is only to be applied as to the receipts of appellee for the local exhi-

bitions of its films in West Virginia. No contention is made, or could be made, that the tax is applicable to the income of appellee received from any other source. A tax could not be imposed by any other State upon this source of income for the reason that any attempt to do so would be extra-territorial, and would be a patent attempt to levy the tax merely because interstate commerce was being done. As was pointed out in *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604:

> "* * * Other factors also show that the tax here does not interfere with interstate commerce. The tax is without discrimination in form or application as between inter- and intra-state commerce and it cannot be imposed by more than one state. The course of interstate commerce is clogged by taxes designed or applied so as to hamper its free flow. * * *
>
> "* * * It would not be a tax on the same activity, either in form or in substance. Like a property tax on the pipes or equipment in different states, it would be a different tax, on a different and wholly separate subject matter, with no cumulative effect caused by the interstate character of the business. * * *"

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, it was said:

> "* * * The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * *"

and also:

> "But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. * * * All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent."

Imposition of the tax in this case can give no rise to the evil pointed out by the Court in *J. D. Adams Manufacturing Co.* v. *Storen*, ____ U. S. ____; 82 L. Ed. 870, by the following language:

> "* * * Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. * * *"

**E. Authorities Which Will Be Urged As Contra to the Views Herein Expressed.**

In the lower Court, counsel for appellee relied principally upon three Court decisions. The lower Court also

relied thereon and same were urged as authority in appellee's motion to dismiss. They will doubtless be urged here, therefore, we deem it proper to discuss same, and to point out certain features therein distinguishing them from the present case.

We have heretofore discussed the case of *Binderup* v. *Pathe Exchange*, 263 U. S. 291, pp. 23-24, *supra*, and again wish to point out that the holding in that case does not militate against our contention in the present case. The sole question there considered was whether or not the distribution of motion pictures, the same being sent from one State to a distributor in another, was interstate transportation to the extent that same would be subject to the provisions of the Federal anti-trust act. The Court did not attempt to consider, it being wholly unnecessary for its decision, the question of the distributor doing a local business such as the control and supervision by himself, or his agents, trustees or employees of, to-wit: the actual exhibition of the films and the receipt of income from that activity. On the other hand, the Court indicated that such an activity would be within the power of the State to control. We have heretofore discussed this expression of the Court, page 24, *supra*.

In *State* v. *Paramount Publix Corporation*, 178 La. 818, a motion picture distributor operated in Louisiana under contracts evidently not unlike the present one, but we desire to point out that the reported case does not reveal the full extent of local activity therein carried on, as we have attempted to reveal with reference to the present case, and further that the films in that case were shipped to a distributor in Louisiana, and by that distributor sent out to the exhibitors in that State. There, the Court said that the tax sought to be imposed was upon "the business of leasing and distributing of motion picture films" in Louisiana, and held that same was merely an essential

part of the performance of the lessor's obligation under the contract of lease made without the State. We wish to point out that the tax which West Virginia seeks to impose upon appellee here is not a tax based upon "the business of leasing and distributing of motion picture films" in West Virginia, but is upon the business of collecting rents, royalties, etc., from the use of appellee's personal property in this State, or more specifically, the business of exhibiting its films in West Virginia. It may well be that between these purposes, there is not a clearly marked line of distinction, but we most earnestly insist that the Louisiana Court, in construing the privilege sought to be taxed conceived it to be one wholly connected with and inseparable from interstate commerce under the principles announced in the *Binderup case,* and proceeding upon that theory, it failed to consider the position we take in this case, namely, that the matter of distribution and leasing is of little moment, and that the activity in and about the exhibition of the films, which can only be local in character, is that which we insist is taxable by the State. The purpose of the tax, so the Louisiana Court observed, is well illustrated by this expression found at page 827 of the opinion:

> "As we have said, if the mere deliveries or distributions of the films of the Paramount Publix Corporation, by the exchange in New Orleans, were separate and independent business transactions, and not merely the fulfillment of the original interstate contracts and shipments, the occupation of delivering or distributing the films might be made the subject of state taxation, even though the Paramount Publix Corporation's entire system of doing business is, as the court decided in the Binderup Case, interstate commerce, subject to control under the Anti-Trust Act. *But the state has not levied the license tax upon the occupation merely of delivering or distributing the motion picture films,*

*and is not seeking to collect the tax merely for such an occupation, but is seeking to collect the tax for 'the business of leasing and distributing of motion picture films.'"* (Italics ours.)

We can easily agree with the Louisiana Court when it says that a state tax upon the *actual distribution of films is invalid.* That is a tax directly imposed upon interstate commerce. However, the purpose of our tax is entirely different, and does not seek to reach out and tax any privilege before it can reasonably be said that a local activity has been engaged in, we believing that the interstate transportation prior to the actual exhibition of the films in the State is purely incidental thereto.

*Paramount Pictures Distributing Co.* v. *Henneford*, 51 P. (2d) 385, (certiorari denied 298 U. S. 665), involved the applicability of the following tax statute: "There is hereby levied and there shall be collected from every person engaging or continuing within this state * * * in any business not specifically taxable under section 2 of this act, an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent," to a distributor of motion pictures not a resident of that State. The contracts under which pictures were there distributed were perhaps generally in accordance with the present contract, although the case does not set out in any detail the extent of local activity, or may we say local control on the part of the distributor over the films when they were in the State of Washington for exhibition, as we have attempted to set forth herein relative to exhibition in West Virginia. There, the films were shipped to a local exchange which had solicited the theater owners and exhibitors to show the pictures of the distributor, and were, by the exchange, sent to such local exhibitors.

The Washington Court found that the local exchange was a link in interstate commerce, and further that *the business done by the local exchange* was a part of interstate commerce, and controlled by the decision in the *Binderup case,* wherefore the tax was declared to be invalid, it, in the opinion of the Court, placing a direct burden on interstate commerce. Here again the Court was construing the effect and purpose of a State statute. It conceived that the activity sought to be taxed was the activity of actual distribution, which, under the authority of the *Binderup case,* is, of course, interstate commerce to at least the degree that it may be subjected to Federal supervision under the Anti-trust Act, but the Court did no consider any other local activity of the distributor through its local exchange, *other than the activity of the actual distribution of the films to exhibitors.* Doubtless the Washington tax act was broad enough in scope to permit a tax such as we here insist upon as being valid, but the Court, in construing its own State statute, decided that the activity which was sought to be reached and taxed under the act was an activity entirely different from that which we insist is a proper subject of taxation. We respectfully direct the Court's attention to the dissenting opinion filed in that case, wherein it was said:

> "Notwithstanding the eminent authority upon which the majority rests its decision, I am convinced that it has misconceived the situation, has failed to see what operation is sought to be taxed, and has misapplied the doctrine of Binderup v. Pathe Exchange, 263 U. S. 291, 44 S. Ct. 96, 100, 68 L. Ed. 308."
>
> "* * *
>
> "When and after the films arrive in this state they are exhibited in local theaters for the joint benefit of the local exhibitors and the film owner.

> The proceeds of those wholly local exhibitions, which are paid to and received by the film owner are the sole basis for the tax. As I see it, such proceeds are wholly derived from the local exhibitions."
>
> * * *
>
> "No such question involving earnings through local exhibitions was involved in the Binderup Case, supra, and not even remotely did the court undertake to decide such an issue. On the contrary, the court clearly pointed out that no such question was involved, saying: 'The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause. * * *"

We, therefore, respectfully submit that the holdings of the Louisiana and the Washington Courts, whether they erred in applying the principles announced in the *Binderup case,* or whether in construing the application, force and effect of their own State statutes they were correct in their conclusions, are not in the last analysis persuasive authority, much less binding authority, upon this Court, in deciding the question of whether or not the instant tax which is patently drawn to apply only to a local transaction, and sought to be enforced only with respect thereto, is valid and enforceable with respect to the receipt of income by appellee from the purely local exhibition of its films over which it exercises a marked degree of control and supervision, and which said exhibition is the one outstanding valuable thing to the appellee relative to its whole activities, and which we conceive all other activities to be merely incidental or supplemental thereto.

## CONCLUSION

In conclusion, it is respectfully submitted: (1) that aside from any connection with interstate commerce appellee is doing business in West Virginia; (2) that for purposes of Federal regulation or supervision the activities sought to be taxed may be considered interstate in character, yet that presents no obstacle to the power of West Virginia to tax this activity, purely local in character; (3) that the exhibition of appellee's films in West Virginia is a purely local activity subject to a nondiscriminatory tax by the State, and any resultant burden on interstate commerce is indirect and incidental, for the reason that (a) the mere formation of the contract does not place appellee's activities within the protection of the commerce clause; (b) the exhibition of appellee's films in West Virginia is a purely local activity, interstate commerce being merely incidental thereto; (c) any resultant burden of the tax falls only remotely and incidentally on interstate commerce, hence the same is valid; (d) the West Virginia tax is not one which in form or substance can be repeated by other States in such a manner as to lay an added burden on interstate commerce; (4) that appellee has no right to complain of the tax imposed in this case; (5) that the tax sought to be imposed is not violative of any of the provisions of the Federal Constitution; (6) that the judgment appealed from should be reversed.

Respectfully submitted,

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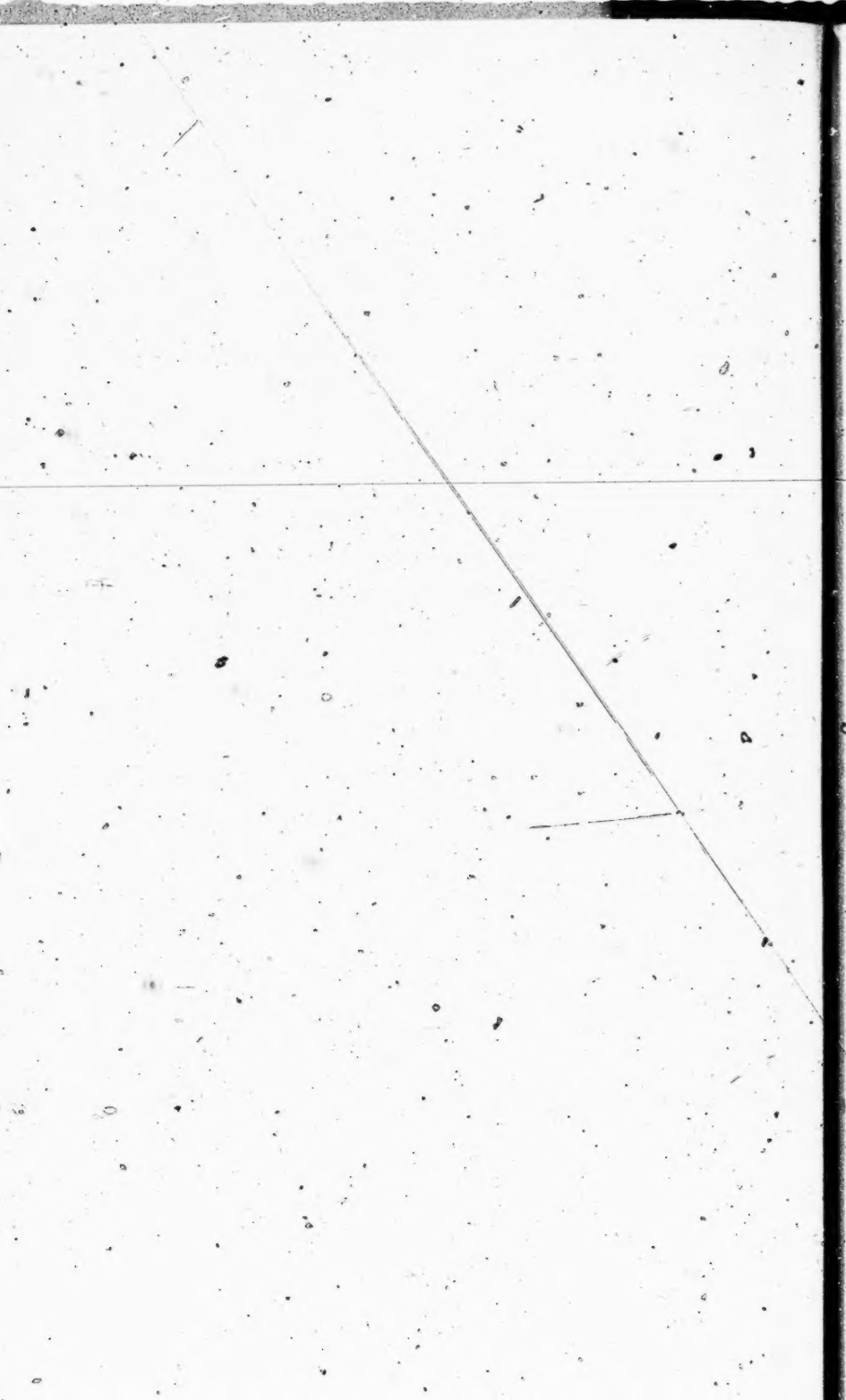

# APPENDIX

## APPENDIX A.

CHAPTER 86, ACTS OF THE LEGISLATURE OF WEST VIRGINIA, REGULAR SESSION, 1935:

"AN ACT to amend section two, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended by section two, article thirteen, chapter thirty-three, acts of the Legislature, first extraordinary session, one thousand nine hundred thirty-three, and to amend said article thirteen by adding thereto sections two-(a) to two-(i), inclusive, relating to business, occupation and privilege taxes.

"* * *

"*Be it enacted by the Legislature of West Virginia:*

"That section two, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended by section two, article thirteen, chapter thirty-three, acts of the Legislature, first extraordinary session, one thousand nine hundred thirty-three, be amended and reenacted and that said article thirteen be amended by the addition thereto of sections two-(a) to two-(i), inclusive, to read as follows:

"Section 2. There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-(a) to two-(i) inclusive, of this article.

"* * *

"Sec. 2-(h). Upon every person engaging or continuing within this state in any service business or calling

not otherwise specifically taxed under this act, there is likewise hereby levied and shall be collected a tax equal to one per cent of the gross income of any such business.

"Sec. 2-(i). Upon every person engaging or continuing within this state in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rentals, royalties, fees, interest or otherwise, the tax shall be one per cent of the gross income of any such activity: *Provided*, That any person who shall make return of and pay a personal net income tax on the incomes covered by this section two-(i) shall not be required to pay the tax herein imposed upon said incomes.

"This act shall take effect as of January first, one thousand nine hundred thirty-five, and the first tax assessed under it shall be upon the calendar year one thousand nine hundred thirty-five."

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# Supreme Court of the United States

OCTOBER TERM, 1938

## No. 161

ERNEST K. JAMES, Individually and in his Official Capacity as Acting Tax Commissioner for the State of West Virginia, *Appellant*,

*v.*

UNITED ARTISTS CORPORATION, a Corporation.

## REPLY BRIEF FOR APPELLANT TO BRIEF FOR APPELLEE.

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JARRETT PRINTING COMPANY — CHARLESTON, W. VA.

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## REPLY BRIEF FOR APPELLANT TO BRIEF FOR APPELLEE.

### Foreword

The purpose of this brief being to reply to that filed for appellee, we will, for the sake of clarity and convenience, discuss rather categorically the particular points advanced by appellee in its brief and to the pages thereof on which the subject matter may be found.

### Appellee's Statement of the Suit.

On page 1 of appellee's brief, it is stated that the tax is based upon the gross receipts of appellee derived from distributing motion picture films to exhibitors in West Virginia. Reference to Section "First" of the contract (R. 14A-14B) reveals that the income of ap-

pellee paid to it by West Virginia exhibitors *is for the right to exhibit or use the films in West Virginia.* No mention is made in the contract of payments for the mere act of distributing said films.

**Appellee's Statement of the Case.**

It is stated on page 2 of appellee's brief, with reference to the applications of the exhibitors which later become the contracts, that "such applications are in the form of offers for the use of the films for a specified period, sometimes for a specified sum, sometimes for a stipulated percentage of the gross box office receipts therefrom." This is more nearly a true statement of the purpose for which payments are made by exhibitors to appellee. Such are for the use of the films—not for the mere act of distribution.

On page 3 of appellee's brief, the statement is made that "appellant, the State Tax Commissioner, claims the right to collect from the appellee a tax of one per cent of the gross proceeds received by the appellee for supplying films to West Virginia exhibitors." We again state that the mere supplying of films is not that for which appellee is paid, but the payment is made for the use of the films after they have been supplied. We pointed out in our brief that no provision of the contract specifies that the films be supplied in any certain manner, whether by intra or inter state commerce.

**Appellee's Contention That It Is Not Doing Business In West Virginia.**

On page 5 of appellee's brief it is asserted that the contract is made in New York; that appellee in shipping the films makes delivery thereof to the exhibitor in New York; that appellee receives the films in New York when returned to it there; and under the contract collects its

income in New York. From this, appellee concludes that so far as this case is concerned New York is the only place in which it is collecting income or doing business. We pointed out in our brief (p. 26) that the mere formation of the contract would not serve to place appellee's activities within the protection of the commerce clause, and it is our view that irrespective of the provisions of Section "Fifth" (2) of the contract (R. 14A-14B) making delivery to a common carrier, etc., delivery to the exhibitor, and the fact that the exhibitors in many instances send their remittances direct to appellee in New York does not, for the practical purposes of taxation, and in view of other more determinative facts, constitute New York as the place in which appellee is exercising the taxable privilege of collecting incomes from the use of its property in West Virginia. We have understood appellee's contention to be that the tax sought to be imposed would place an unlawful burden on interstate commerce—not that the tax would be an attempt to exercise extraterritorial jurisdiction by the State of West Virginia. It appears to us that should the State of New York attempt to tax appellee relative to this income arising in West Virginia from the use of its films there, such would be an attempted exercise of extraterritorial jurisdiction by New York, and we daresay that appellee could successfully resist the payment of such a tax.

On page 5 of appellee's brief, the statement is made that "appellant argues that he is attempting to tax the local business of exhibiting films and collecting box office receipts from customers who pay to see the films; * * *. Such local business is the business of an exhibitor, not of a distributor; it is the business of operating a theater; * * *." We do not believe this Court will be confused, as appellee apparently is, by the use in our brief of the terms "local exhibition" and "local activity." It is

apparent that such are used only with respect to the relationship which the activities of appellee in West Virginia, in and about the collection of rentals from the use of its films there, bear thereto. We do not attempt to say that the business of appellee is that of an exhibitor or that appellee is in the business of "operating a moving picture show" or "theater" in West Virginia; but we do say, and to set at rest any doubt which could arise by reason of any statement made in our brief which might possibly lack clarity, that the local activity which we seek to tax is broadly that within the terms of the statute, to-wit: of collecting incomes in the State of West Virginia from the use of its property in said State. We conceive that irrespective of the procedure appellee follows relative to the collection of such incomes, whether it take the form of exercising a marked degree of control over the actual showing of the films or otherwise, that so long as its activities relative to the collection of such incomes are local; the State can tax. If to accomplish these purposes, it controls a part of a broader activity, taxable as a whole under another provision of law, such does not prevent appellee being taxed on account of the privilege it exercises. The immediate purpose of appellee is to secure its rents and profits from the use of its films. Throughout our brief, we attempted to point out that the exhibition of the films in West Virginia is an activity purely local in character carried on after interstate commerce for all practical purposes had ended; that it is this local exhibition in which appellee is immediately concerned and with reference to which it exercises the privilege we seek to tax. Its activities may well aid and promote the local exhibition, but such are solely for the purpose of securing to appellee its rentals or fees from the use of such films. We contend, and are pleased to note that appellee admits, that the exhibition of films is a taxable local activity. It cannot be denied

but that appellee is vitally interested in that local activity and exercises a marked degree of control and authority over the same for no other purpose than to secure its rents, profits and royalties from the use of the films, hence, we think it logically follows that the exhibition being local the activities of appellee concerning that local exhibition may also be deemed to be local. Surely it cannot be successfully contended that when appellee controls to a marked degree a part of a broader activity which may be local as a whole, in order that it may reap benefits from the exercise of a certain privilege, that it is exempt from the payment of taxation for this privilege exercised by reason of the fact that the larger and broader activity is also subject to a privilege tax. There can be no doubt but that one in doing a particular kind of business or exercising a particular privilege may, in numberless instances, in and about the protection of his interests therein, control to a certain degree a part of a related activity which in itself may be taxable under proper statutes.

Appellee, after arguing that because of our position that it exercises control over what we term the "local exhibition" of the films, argues that "local exhibition" as used in that sense is "operating a theater" in West Virginia. It may well be that with respect to a certain state of facts the term "local exhibition" might be synonymous with the term "operating a theater". Nevertheless, we submit that the matter depends entirely upon the sense in which the term "local exhibition" is used. We are concerned in this case with the use of motion picture films and the collection of rentals therefor after such films have arrived in the State of West Virginia; the packages in which they are contained have been broken; said films then being placed in the projection machines in theaters and flashed upon the

screens. "Operating a theater" is indeed much broader than the term "local exhibition" when used in this connection. "Operating a theater" requires a great outlay of capital; a place permanent in nature in which to make the "local exhibition"; the employment of many people; involves the care, comfort and safety of the public viewing the "local exhibition" and numerous other activities and items of capital outlay and expense. The actual exhibition of a film is but one of the many things which constitutes "operation of a theater". Appellee then proceeding upon the false premise that "local exhibition" as used in our brief, with respect to the connection between such and appellee's business of collecting its rents and royalties from the use of its films, is in effect "operating a theater", argues that the activity is taxable under Section 2 (g) of the Act here involved, which section is set forth on page 6 of appellee's brief. It is true that said section taxes every person engaging or continuing in the State of West Virginia in the business of operating a theater, opera house, moving picture show, etc., the tax being based upon the gross receipts from such businesses. Hence, appellee concludes that if its activities are taxable at all, the same are taxable under Section 2 (g), and argues that the State of West Virginia having already exacted its tax from the local theater owners and operators under said section, based upon their gross receipts, that appellee cannot be taxed relative to the rentals it receives from its films for the reason that every cent received by the exhibitor has already been taxed for a privilege. We fail to see the logic of appellee's argument. The tax imposed under the Act here involved is upon the privilege of engaging in certain businesses, the gross income being merely the measure of the tax. The thing taxed is the privilege exercised. If appellee's argument in this respect were carried out, no other conclusion could be arrived at but that

a person operating a motion picture show in West Virginia having once paid his tax based upon the gross receipts from that business would thus automatically exempt every person furnishing to the exhibitor some service in aid of the exhibition, from being taxed for the privilege thus exercised in furnishing such service. For example, the exhibitor in West Virginia might rent the building in which he carried on his activity. Certainly such would not exempt the owner of the building from a proper payment of taxes for the privilege he exercises relative thereto, merely because it might be conceived that the gross receipts of the theater owner, which had been used as a basis for taxation, might be paid the owner of the building for such rentals. Furthermore, it might well be that the theater owner rents a projection machine. Would the person who owns the projection machine and exercises the privilege of receiving rents and royalties therefrom in West Virginia be exempt from taxation on that privilege? We believe not. It certainly might well be that the owner of the building and the owner of the projection machine would impose upon the theater owner certain restrictions and obligations relative to the use thereof, which in effect would control to a marked degree the activities of the theater owner in the conduct of his business respecting such property, but for that reason the owner of the building or the owner of the projection machine would not be engaged in "operating a theater." Likewise, is the appellee in receiving rents and royalties from the use of its films by the theater owner, by reason of the fact that in order to secure its rents and royalties it exercises a marked degree of control over the theater owner relative to the exhibition thereof, to be considered for the purposes of taxation to be "operating a theater"? Are appellee's incomes from the use of said films to be exempt from proper taxation by the State of West Virginia merely because the theater owner has

paid a tax for the privilege he exercises based upon his gross receipts when the theater owner may possibly pay some of those gross receipts to the appellee for the use of its films? These are separate privileges, and, taxation being a practical matter, it appears to us that no other practical conclusion can be arrived at other than to the effect that the business of "operating a theater" is separate and distinct from the business of receiving rents and royalties for the use of property even though that property may be used with respect to the operation of the theater, and the owner thereof may to a substantial degree exercise control over the operation of the theater.

On page 8 of appellee's brief, it is stated that it has no control over the films after they leave New York, *other than the right to insist that they be used and returned in accordance with the terms of the contract of lease.* We pointed out in our brief (pages 5-8 and 18-21) some of the outstanding terms of this contract. We again respectfully submit that under the terms thereof appellee is locally engaged in a taxable privilege. Appellee states at page 8 of its brief that nothing is done by it in connection with the films in West Virginia *"other than to promote their use"*. Certainly a broad and comprehensive statement. It appears to us that such "promotion" and use in West Virginia, in the manner allowed and provided for by said contract, is of such magnitude as to make the "promotion", in West Virginia, appellee's entire business of any sort; that "promotion" is indeed vital to it in and about the collection of its rentals.

**Appellee's Contention That It Is Engaged In Interstate Commerce.**

Appellee, on page 11 of its brief, after reference to the case of *Binderup* v. *Pathe*, 263 U. S. 291, and other cases wherein the same is cited, states that "it is im-

conceivable that it can be seriously argued that film distribution is not interstate commerce". We do not argue that the act of transporting the films from New York or some other place outside West Virginia to exhibitors in this State, and reshipment from this State to another State, is interstate commerce. That is pure distribution. We do deny that appellee's activities sought to be taxed are interstate commerce. Pure distribution is incidental to the local activity which takes place after the films have come to rest in West Virginia, and it is only with reference to such local activity that the instant tax is sought to be imposed. Appellee states on page 12 of its brief "the sole function of the distributor is to supply the films, and that function is completed when the films are delivered to the exhibitor by transportation without the State." We readily admit that if such is the sole function of appellee, West Virginia cannot tax, but the contract in this case and the facts surrounding same, do not even tend to support this statement. If, as contended, the sole function of the appellee is merely the supplying of films by an act of interstate transportation, why is it that appellee has taken such a deep interest in the films after that act of transportation has ended? No other argument can be sustained but that it is the use of the films after transportation has ended in which appellee is interested. It appears to us that "distribution" and "supplying" indicate acts in the nature of pure transportation, whereby all duties regarding or interest in the article distributed or supplied would end upon the termination of transportation. In this case, the termination of transportation marks the beginning of appellee's supervision over and interest in the use of the article "distributed" or "supplied".

We are pleased to note that at page 13 of appellee's brief it is stated: "The act of exhibiting films is intra-

state commerce and taxable by states under applicable statutes." We assume that appellant there refers to exhibition in a broad sense as being comparable to the activity of a motion picture theater owner. If so, there can be no reason why an activity carried on by some other person which aids or even is apart of such exhibition cannot be taxed by West Virginia if the privilege exercised thereby is one covered by the tax statute in question.

**Appellee's Statement That the Tax Is An Invalid Burden On Interstate Commerce.**

On page 17 of its brief, appellee again agrees that the exhibition of its films in West Virginia is a local activity which can properly be taxed by the State, but says that exhibition is not the business of appellee. We, of course, contend that the theater owner, in operating his theater, is doing a local business, but the exhibition of appellee's films in those local theaters is a part of the business of operating a theater. Appellee's control of the act of exhibiting the film is for the purpose of assuring its proper income from that act of exhibition, and in so doing it has and is concerned purely with a local activity; hence is locally engaged in the business of collecting incomes from the use of personal property in this State. After all, it makes little difference by what process it achieves its purposes, whether it be by controlling the actual exhibition of the films, or by control of some other activity connected with the showing of its films. It is the control and supervision of an activity carried on in the State of West Virginia by which appellee exercises its taxable privilege of collecting incomes from the use of its property.

## Conclusion

It is believed that all other points or arguments advanced by appellee in its brief have been fully met by our brief, and we again respectfully submit that the judgment appealed from should be reversed.

CLARENCE W. MEADOWS,
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FORREST B. POLING,
*Assistant Attorney General,*

W. HOLT WOODDELL,
*Assistant Attorney General,*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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# No. 161

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ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA,

*Appellant,*

*vs.*

UNITED ARTISTS CORPORATION.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

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## MOTION TO AFFIRM.

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R. G. KELLY,
*Counsel for Appellee.*

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1938

## No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA,

*Appellant,*

*vs.*

UNITED ARTISTS CORPORATION, A CORPORATION.

## MOTION TO AFFIRM.

Now comes United Artists Corporation, the appellee, by R. G. Kelly, its counsel, and moves this Court to affirm the judgment and decree from which the appeal in the above entitled cause has been taken, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The facts upon which this motion is based are as follows: This is a suit to enjoin the Tax Commissioner of West Virginia from attempting to collect from the appellee a tax, measured by income received by it from the leasing of motion picture films owned by it and distributed to exhibitors in West Virginia, under Section 2(i) of Article 13, Chap-

ter 11, Code of West Virginia, as amended. Appellee is a Delaware corporation with its principal office and place of business in New York City and is engaged in the business of distributing motion picture films from its place of business to exhibitors in practically every State in the United States, including the State of West Virginia. It has no office or place of business in West Virginia.

The facts more fully appear from the stipulation filed herein and the findings of the Court, in which findings it is stated that: "Always the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff (appellee) without the State." Appellant was permanently enjoined from collecting or attempting to collect the tax from appellee, and the Court held that the State of West Virginia has no power to impose and collect the tax because (1) appellee is not engaged in business in the State of West Virginia, and (2) the acts of appellee constitute interstate commerce. These two findings of the Statutory Court give rise to the questions on which the decision of this cause depends.

**Appellee is Not Doing Business in West Virginia.**

The "doing business" question raised by appellant is so unsubstantial as not to need further argument. The Supreme Court of Appeals of West Virginia in *Underwood Typewriter Co.* v. *Piggott*, 60 W. Va. 532, 55 S. E. 664, has held that sales in one State by a foreign corporation of another, having no place of business in the State in which they take place, "does not constitute doing business in the State". In *United, etc. Machine Co.* v. *Carney*, 116 W. Va. 224, 179 S. E. 813, it is held that a Maine corporation leas-

ing a machine for use in West Virginia by an agreement made in New Jersey, is not doing business in West Virginia. In *Pennywitt* v. *Blue, State Tax Commissioner,* 73 W. Va. 718, 81 S. E. 399, the Court holds that "the legislature cannot be deemed to have intended to subject brokers engaged exclusively in interstate transactions to the license tax." It is submitted that this is not a Federal question. But there is no divergence in the decisions of the Supreme Court of Appeals of West Virginia and of the Supreme Court of the United States. This Court has decided that comparable activities do not constitute doing business: *Western Oil R. Co.* v. *Lipscomb,* 244 U. S. 346, 61 L. Ed. 1181, 37 Sup. Ct. 623; *United Shoe Machinery Corp.* v. *U. S.,* 258 U. S. 451, 66 L. Ed. 708, 42 Sup. Ct. 363.

**Appellee is Engaged in Interstate Commerce.**

The "interstate commerce" question raised by appellant is so unsubstantial as not to need further argument. This Court has so found in *Binderup* v. *Pathe,* 263 U. S. 291, 68 L. Ed. 308, 44 Sup. Ct. 96, which case has been followed in many Federal decisions, including *U. S.* v. *Paramount,* 34 F. (2d) 984, which was affirmed by this Court in 282 U. S. 30, 75 L. Ed. 145, 51 Sup. Ct. 42. In a tax case, comparable with but not as strong as the instant case, this Court recently answered this question by denying a writ of certiorari: *Paramount, etc. Co.* v. *Henneford, et als., Tax Com'rs,* 184 Wash. 376, 51 Pac. (2d) 385; certiorari denied April 27, 1936, 298 U. S. 665, 80 L. Ed. 1389. All of the points set out in appellant's "Statement of Points to be Relied Upon" filed in the instant case were urged and disposed of in the State court at the hearing of the case last above cited, and were again urged and discussed in briefs filed with this Court in support of and in resistance to the application for a writ of certiorari in that case.

**The Tax is an Invalid Burden Upon Interstate Commerce.**

This Court has consistently held that a State tax can not constitutionally be laid upon gross receipts from interstate commerce. On May 16, 1938, in *Adams* v. *Storen*, No. 641, October Term, 1937 (decided May 16, 1938), this Court said: "We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce. Appellant's sales to customers in other States and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent on every dollar received from these sales. * * * We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution."

It is respectfully submitted that the questions on which the decision of this cause depends are clearly foreclosed by prior decisions of this Court, and that there is no question presented in this case open for decision, and that this Court should affirm the judgment rendered herein.

(Signed) R. G. KELLY,
*Charleston, West Virginia,*
*Counsel for United Artists*
*Corporation, Appellee.*

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# Supreme Court of the United States

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, Individually and in his Official Capacity as Acting Tax Commissioner for the State of West Virginia,
*Appellant,*

v.

UNITED ARTISTS CORPORATION, a Corporation,
*Appellee.*

## BRIEF FOR APPELLEE

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# Supreme Court of the United States

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No. 161

ERNEST K. JAMES, Individually and in his Official Capacity as Acting Tax Commissioner for the State of West Virginia,
*Appellant,*

v.

UNITED ARTISTS CORPORATION, a Corporation,
*Appellee.*

## BRIEF FOR APPELLEE

### THE SUIT.

This is a suit in equity brought by United Artists Corporation against the Tax Commissioner of the State of West Virginia to enjoin him from collecting a tax based upon gross income of appellee derived from distributing motion picture films to exhibitors in West Virginia. The case was heard by a District Court of three Judges on appellee's application for interlocutory and permanent relief. No evidence was taken, the cause being submitted on a stipulation of facts, and it was agreed that the hearing should be final. The relief prayed for was granted. The opinion delivered by the three Judge Court on May 20, 1938, is reported in *United Artists Corporation* v. *James*, 23 F. Supp. 353.

## STATEMENT OF THE CASE

The following facts appear from the stipulation (R. p. 29): The appellee is a Delaware corporation, with its chief office in New York City. It has motion picture films which it distributes to exhibitors (theatre owners and managers) throughout the United States for exhibition by such exhibitors in theatres operated by them. It maintains branch offices in many cities, including Cincinnati, Ohio, Pittsburgh, Pennsylvania, and Washington, D. C. These three offices and the New York office are the only ones that do any business with exhibitors in West Virginia. Appellee has no branch, office, agent or employee in West Virginia, and owns no property within the State. It does not own, operate, or have any interest in any theater in West Virginia.

In distributing films to exhibitors in West Virginia, the appellee makes public announcements of the films it has or will have to offer. Exhibitors then apply in writing to the appellee in New York or at one of the above mentioned branch offices, for such films as they may want. Such applications are in the form of offers for the use of the films for a specified period, sometimes for a specified sum, sometimes for a stipulated percentage of the gross box office receipts therefrom. When an application is accepted, a contract is made by executing a written acceptance thereon. The contract requires the exhibitor to return each film to the appellee at its office in New York or at one of the branches, or to ship it to another exhibitor if so directed.

As was found by the Court in *United Artists Corporation* v. *James*, *supra* (R. p. 36):

> "Always the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff (appellee) without the State."

The stipulation further shows that: In 1936 the appellee made 1,546 shipments of films to 144 theatres in West Virginia; these shipments made but one stop in the State, excepting that on two occasions a shipment made two stops before leaving the State; on eight occasions the appellee had box office receipts of exhibitors checked by independent contractors who never collected any moneys; an employee of the appellee comes into West Virginia to stimulate the use of appellee's films.

The appellant, the State Tax Commissioner, claims the right to collect from the appellee a tax of one per cent of the gross proceeds received by the appellee for supplying films to West Virginia exhibitors. His claim is based upon the following state statute (Sec. 2-(i), Art. 13, Ch. 11):

> "Upon every person engaging or continuing within this state in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rentals, royalties, fees, interest or otherwise, the tax shall be one per cent of the gross income of any such activity: *Provided*, That any person who shall make return of and pay a personal net income tax on the incomes covered by this section two-(i) shall not be required to pay the tax herein imposed upon said incomes."

Pursuant to such claim, the appellant has made tax assessments upon the appellee of more than $4,000.00, and has demanded that the same be paid, and has made threats to the appellee and to sundry exhibitors of appellee's films that he will attach funds due to the appellee from such exhibitors, will attach or summarily distrain appellee's films in the possession of such exhibitors, and will invoke all other civil remedies and the criminal penalties provided by statute.

## ARGUMENT

### *Summary*

The errors assigned and urged by appellee are the findings of the District Court that

(1) Appellee is not doing business in West Virginia;

(2) Appellee is engaged in interstate commerce;

(3) The tax sought to be levied is an invalid burden upon interstate commerce.

Upon the facts stipulated each conclusion of the District Court seems plainly right. Appellee is not engaged in West Virginia in the business described in the taxing statute invoked, is not engaged in West Virginia in business of any kind, and so far as this case is concerned it is engaged in business solely in the State of New York. That the business in which appellee is engaged is clearly interstate commerce has been repeatedly held by State and Federal Courts. Appellant admits in brief that the State can not by a tax place a direct burden upon interstate commerce. It is respectfully submitted that the questions on which the decision of this cause depends have been settled by prior decisions of this

Court, and that the judgment of the District Court should be affirmed.

### *Appellee is Not Doing Business in West Virginia*

The first assignment of error is the holding of the District Court "that the plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interest or otherwise."

It seems inconceivable that appellee can be held to be engaged within the State of West Virginia in the business of collecting incomes. The contract is made in New York. Appellee ships the films, and so makes delivery thereof to the exhibitor, the consignee, in New York, receives them when returned in New York, and under the contract collects its income therefrom in New York. The business sought to be taxed by the State of West Virginia is wholly done in New York or at one of said branches outside the State of West Virginia. So far as this case is concerned, New York is the only place in which appellee is collecting income or doing business.

Appellant argues that he is attempting to tax the local business of exhibiting films and collecting box office receipts from customers who pay to see the films; that appellee has an interest in that activity and is therefore engaged in that business. This argument is unsound. Such local business is the business of an exhibitor, not of a distributor; it is the business of operating a theater; and the legislature has recog-

nized and taxed such business and activity by the enactment of Section 2 (g), Article 13, Chapter 11, which is as follows:

> "Upon every person engaging or continuing within this state in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, race track, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to one half of one per cent of the gross income of the business."

Appellant must admit that he is collecting his full measure of tax upon the exhibition of films under Section 2 (g). In seeking to tax under Section 2 (i), Article 13, Chapter 11, the alleged interest of appellee in the gross income of the theater business, appellant places himself in the illogical and indefensible position of undertaking to tax under Section 2 (i) an activity not described therein, or on the face of the section taxable thereunder, but clearly described in and taxable under Section 2 (g), thus proposing to doubly tax appellee's share (according to appellant's contention) of the gross income of the business of operating a theater. If appellee is engaged in the local business of exhibiting pictures or has an interest in that business as contended, the gross income from such business or interest is fully taxed under Section 2 (g) at the rate of one-half of one per cent, as the legislature intended. Every cent received for the exhibition (whether it belongs to the theater owner or the distributor) is thus taxed. But appellant argues when this once taxed interest of the distributor in the gross income of the business of operating a theater reaches the distributor it becomes rental from the lease of personal property and is taxable a second time under Section 2 (i) at a rate double that of the tax already paid thereon, and this notwithstand-

ing the plain purpose of Section 2 (i) to avoid double taxation.

To state appellant's proposition is to refute it. If appellee is engaged in business in West Virginia as appellant contends, that business is the operation of a theater, and appellee is now paying its tax under Section 2 (g) as such operator. If appellee's business is that of leasing personal property, as it clearly is, then that business is not taxable by the State of West Virginia, because the statute was not intended to, and does not, apply to the collection of income in the State of New York arising from business carried on wholly without the State of West Virginia, as the District Court found upon the facts stipulated. The fact that the films come to rest in West Virginia for a period before leaving the state would be material only if it were sought to subject them to a property tax. Such fact does not subject the income from the lease of the films to an excise tax. Railroad rolling stock may be subject to a property tax in a State in which it is used, but the income it earns in interstate commerce can not be taxed by a state. *Galveston, etc. R. Co.* v. *Texas*, 210 U. S. 217.

Appellant says in his brief that Section 2 (h) of Article 13, Chapter 11 is also involved in this case. That section imposes a tax upon every person engaged within the state in any business not otherwise specifically taxed under the statute. Under the facts, appellee can not conceivably be engaged in any business other than leasing films or exhibiting films. Leasing is specifically taxed by Section 2 (i). Exhibiting films (operating a theater, moving picture show, or other place at which amusements are offered to the public) is specifically taxed by Section 2 (g). Therefore, Section 2 (h) can have nothing to do with the case.

The distributor has no control over films after they leave New York other than the right to insist that they be used and returned in accordance with the terms of the contract of lease. It does nothing in connection with the films in West Virginia other than to promote their use and to see on rare occasions that the amounts paid to it in New York are those payable under the terms of the lease.

Appellant's brief, in discussing the facts, says that appellee's business consists of procuring and having theater owners to exhibit its motion picture films. Perhaps terminology is not important, but the stipulation and the exhibited contract show that appellee is engaged solely in leasing films to exhibitors.

The Supreme Court of Appeals of West Virginia has held that a foreign corporation may send its salesmen into the state to take orders and that it may come to the state in order to collect for or recover the merchandise sold, without qualifying to do business in the state, saying in *Underwood Typewriter Co.* v. *Piggott*, 60 W. Va. 532, 55 S. E. 664, that:

> "A foreign corporation, which sells and delivers goods, merchandise, machinery, or other articles of trade and commerce in this state upon orders taken therefor by its agents and traveling salesmen, and forwarded to it, and not otherwise, and transacts no other business in the state, does not transact or carry on business in this state, within the meaning of Sec. 30 of Ch. 54 of the Code."

In *United, etc. Machine Co.* v. *Carney*, 116 W. Va. 224, 179 S. E. 813, it is held that a Maine corporation leasing a machine for use in West Virginia by an agreement made in New Jersey, is not doing business in West Virginia. In *Pennywitt* v. *Blue, State Tax Commissioner*, 73 W. Va. 718,

81 S. E. 399, the Court holds that "the legislature cannot be deemed to have intended to subject brokers engaged exclusively in interstate transactions to the license tax."

Under his first point appellant cites eleven cases to support his position that appellee is doing business in West Virginia. In every one of these cases the corporation involved was engaged in activities entirely different from those involved in the instant case, and many of these cases definitely hold that activities similar to those in which appellee is engaged do not constitute "doing business." In the cases cited by appellant the corporations involved were engaged locally in one or more of the following activities: Managing hotels, engineering, maintaining offices, owning and managing personal property, installing equipment, servicing machinery, receiving payments, carrying on an established business. For instance, in *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 61 L. Ed. 460, it was held that a company that owned land and employed others to do engineering and other work for it thereon was doing business in the state where such work was carried on, but that the mere leasing of property and "doing only what was necessary to receive and distribute the income therefrom" was not doing business. In three of the cases a net income tax was involved. Such cases have been distinguished from gross income cases by the appellate court of West Virginia in *Gas Co.* v. *Hall*, 102 W. Va. 272, 135 S. E. 582, which decision was affirmed on appeal, Id. 274 U. S. 284, 47 Sup. Ct. 629, 71 L. Ed. 1094. In none of the cases cited was a tax upon gross receipts from commerce involved.

The cases cited by appellant are authority for what has been held to be doing business and what has been held to be not doing business. They are persuasive authority that

appellee is not doing business in West Virginia. And the court of last resort of the State of West Virginia has clearly and repeatedly indicated that no activity of the appellee in West Virginia is such as can be held to constitute doing business in West Virginia.

The "business of collecting incomes" and the "business of operating a theater" have been clearly distinguished by the West Virginia legislature and a different rate of taxation exacted for the privilege of engaging in the separate businesses. The only local business carried on in connection with the films is that of "operating a theater." In *North v. Ohio Oil Co.*, 83 Mont. 353, 272 Pac. 534, it was sought to impose an occupation tax for the privilege of producing oil on a lessor upon the theory that he was engaged in the business of producing oil because he received a share of the proceeds from such production. The Court held that the lessor was not engaged in such business because "he merely grants a right to the operator to engage in such business upon his land. * * * The well is subject to the exclusive control of the lessee so long as he performs all of the conditions of the lease * * *."

It is respectfully submitted that appellee is not engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, and that the statute sought to be invoked by appellant has no applicability to the activities of appellee under the very terms of the statute.

### *Appellee is Engaged in Interstate Commerce*

The second assignment of error is the finding that the acts of appellee constitute interstate commerce.

In 1923, in an anti-trust case, this Court determined that the distribution of moving picture films is interstate commerce. *Binderup* v. *Pathe*, 263 U. S. 291, 68 L. Ed. 308, 44 Sup. Ct. 96. Since that time that decision has been followed by the Federal Courts. *United States* v. *Paramount*, 34 F. (2d) 984, 282 U. S. 30, 75 L. Ed. 145, 51 Sup. Ct. 42; *Fox Film* v. *Federal Trade Comm.*, 295 F. 353; *U. S.* v. *First National Pictures*, 34 F. (2d) 815; *Majestic Theatre* v. *United Artists*, 43 F. (2d) 991; *Paramount Publix* v. *Hill*, 11 F. Supp. 478, are some of the Federal decisions that have held that the interstate character of the distribution of films "is no longer open for consideration since the decision of Binderup v. Pathe". State courts of last resort have likewise cited and followed *Binderup* v. *Pathe*. *Glass* v. *Hoblitzelle*, (Tex. Civ. App.) 83 S. W. (2d) 796; *State* v. *Paramount*, 178 La. 818, 152 So. 534; *Paramount, etc. Co., et als*, v. *Henneford, et als, Tax Com'rs*, 184 Wash. 376, 51 Pac. (2d) 385. Each of these cases considered the "broken package" or "coming to rest" theory, and the latter two cases involved attempts by states to impose taxes upon the proceeds from the distribution of films. No case having been found to the contrary, it is inconceivable that it can be seriously argued that film distribution is not interstate commerce.

The facts in *Paramount* v. *Henneford*, *supra*, are almost identical with, but are not as strong as, those in the instant case because in the former case the distributor maintained a

branch office in the state which sought to impose the tax. In no case cited above are the facts stronger than the facts in the case at bar.

Appellant's brief states that the State is not presuming to tax the act of distribution, but seeks to tax those activities carried on within the State, after actual distribution and interstate commerce has ceased. This and every other argument advanced by appellant was advanced by the dissenting opinion in the case of *Paramount* v. *Henneford*, *supra*, and these arguments were again advanced upon the application to this Court for the writ of certiorari in that case. (The writ was refused: 298 U. S. 665.) But the dissenting State judges in that case and the appellant here have misconceived the nature of the tax sought to be imposed. It is not upon the exhibition of the films or upon the box office receipts of local theaters. That activity and those proceeds are adequately taxed, as has been heretofore pointed out. The sole function of the distributor is to supply the films, and that function is completed when the films are delivered to the exhibitor by transportation without the State.

Under his second point appellant cites ten cases to support his position that a business may be interstate commerce and at the same time be subject to state taxes or regulation. Of these ten cases only one (*Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250) involved a tax upon gross receipts from commerce, and in that case the commerce involved was local in character. Such of the other cases as dealt with taxation at all involved property taxes upon personal property that had lost its interstate character and had become part of the general mass of property within the state. Typical of these cases is *Minnesota* v. *Blasius*, 290 U. S. 1,

which holds that states may subject to a property tax chattels that have come to rest within a state and which are under the control and at the disposal of the owner. And the Court holds therein that a state can not tax interstate commerce by laying a tax upon the business or the privilege of engaging therein or upon receipts derived therefrom.

Appellant misconstrues the decisions he cites. None of them hold that gross receipts from interstate commerce are subject to state taxation. That local activities which are separate and distinct from interstate commerce may be taxed and that property that has been withdrawn from interstate commerce can be subjected to a state property tax is not questioned, but such propositions have no application to the instant case. The act of leasing films involved in this case is interstate commerce, and it is this activity which is sought to be taxed by the appellant. No property tax is involved. The act of exhibiting films is intrastate commerce and taxable by states under applicable statutes. But if appellee were engaged in such activity it would be adequately taxed under Section 2 (g). Appellant is now receiving his full measure of tax under that section for all film exhibiting activities in the state. Appellee's activity can not be put in, and incidentally taxed as belonging to, one taxable class for the purpose of subjecting it to taxation at the rate imposed by the statute upon a different taxable class. If its business be leasing of films, that activity is in interstate commerce, and not taxable by the state. If its business be exhibiting films, that activity is being taxed by the state at the rate fixed by the legislature.

***The Tax is an Invalid Burden on Interstate Commerce***

The third assignment of error is the awarding of the permanent injunction. Under this point appellant argues that if the offending tax on appellee's acts is a burden on interstate commerce, such burden is indirect and incidental.

This Court has so consistently held that a State tax can not constitutionally be laid upon gross receipts from interstate commerce that it would seem unnecessary to cite cases in support of the proposition.

In *Adams* v. *Storen*, 82 L. Ed. 870, 58 Sup. Ct. 913, 304 U. S. 307, this Court said:

> "We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce. Appellant's sales to customers in other States and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent on every dollar received from these sales. * * * We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution."

Appellant apparently admits, as he must, that the state can not place a direct burden upon interstate commerce. But he again argues that the State may tax local activities and property which is removed from interstate commerce, a sound proposition but not applicable to the instant case. He cites twenty-six cases, a number of which (*Bacon* v. *Illinois*, 227 U. S. 502; *Wiloil Corp.* v. *Pa.*, 294 U. S. 169; *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17) are cited under the second point in his brief and are in line with the holding in *Minnesota* v. *Blasius*, *supra*.

Some of the cases (*American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604) uphold a state property tax upon personal property that has become separated from interstate commerce. No property tax is involved in the case at bar. Three of the cases (*Browning* v. *Waycross*, 233 U. S. 16; *General Railway Signal Co.* v. *Va.*, 246 U. S. 500, *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165) uphold the right of a state to require a license to engage in a local activity. The gas cases cited (*East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465; *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. 148; *Public Utilities Commission* v. *Landon*, 249 U. S. 236; *Missouri ex rel Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298) are to be distinguished from the one at bar. In them the business of selling and distributing locally natural gas after the interstate transportation thereof had been completed was held taxable. The motion picture cases cited (*Mutual Film Co.* v. *Industrial Commission of Ohio*, 215 F. 138, 236 U. S. 230; *Mutual Film Corp.* v. *Hodges*, 236 U. S. 248; *Fox Film Corp.* v. *Trumbull*, 7 F. (2d) 715; *Boynton* v. *Fox*, 60 F. (2d) 851; *Eureka Productions* v. *Lehman*, 17 F. Supp. 259, affirmed 302 U. S. 634) involve an exercise of police power in censoring films.

None of the cited cases hold that a state may place a tax upon gross receipts from interstate commerce. Some of them hold the converse. *Adams* v. *Storen*, *supra*, distinguishes many of the cases cited from the one at bar in this language:

> "So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity, the manufacture of the goods sold,

> it may be reached for local taxation by a tax on the privilege of manufacturing, measured by the value of the goods manufactured, or by other permissible forms of levy upon the intrastate transaction. It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate."

No fault is found with the authorities cited by appellant other than the fact that they are not at all applicable in the instant case (except as they hold that gross receipts from interstate commerce may not be taxed by a state). In support of his argument that the tax under consideration is not a burden upon interstate commerce, appellant advances the same argument that he advances for each of his propositions, i. e., that the activity sought to be taxed is the local exhibition of the films, which activity he very properly says is local in character and is not interstate commerce. As has been repeatedly pointed out, this is the activity of the exhibitor, it has been recognized as a distinct and different activity by the legislature, and is adequately taxed. Under the "leasing" section of the statute appellant seeks to impose a tax upon the income derived by appellee from the lease of films, which activity is in fact the only one in which appellee is engaged, and which income is derived from interstate commerce.

* * * *

In concluding his brief appellant repeats a number of assertions. Appellee's positions in regard to each of such assertions are repeated seriatim:

1. Appellee is not doing business in West Virginia, and is not engaged therein in collecting incomes by lease or otherwise.

2. The fact that appellee's business is entirely interstate commerce presents an obstacle to the imposition of a state tax upon the gross proceeds of such business.

3. The exhibition of appellee's films by theater owners in West Virginia is a local activity and it is not contended that a tax thereon is a direct or indirect burden on interstate commerce.

(a) It is agreed that appellee's business is not interstate commerce merely because the contract was formed in New York; but it is submitted that performance of such contract in New York places such business within the protection of the Commerce Clause. Such performance consists of delivery of films to West Virginia theater owners outside of West Virginia, the return of films to appellee outside of West Virginia, and payment for the right to exhibit the films to appellee outside of West Virginia.

(b) It is agreed that exhibition of films is a local activity. But exhibition of films is not the business of appellee.

(c) It is agreed for the purposes of this case that a tax on the exhibition of films is valid. But the tax sought to be imposed is not a tax on the exhibition of films and is a burden upon interstate commerce.

(d) It is agreed that a tax on exhibition of films in West Virginia can not be repeated by other states, but it is not agreed that a tax on the gross proceeds from the leasing of films in New York can not be repeated by a state other than West Virginia.

4. The tax sought to be imposed is violative of the Commerce Clause, which justifies appellee's complaint.

5. The judgment appealed from should be affirmed.

Most of appellant's assertions could be conceded without leading to any conclusion other than that the judgment appealed from is plainly right. Under point "E" in his brief, appellant says that the tax sought to be imposed "is not a tax based upon the business of leasing and distributing of motion picture films in West Virginia, but is upon the business of collecting rents, royalties, etc." This unusual statement does not serve to clarify appellant's position. Both "leasing" and "collecting rents and royalties" in West Virginia are taxed by Section 2 (i). Perhaps appellee's activity would come within the provisions of Section 2 (i) if appellee were engaged in the business of leasing films in West Virginia. But this activity is carried on in New York and not in West Virginia and hence can not be and is not intended to be taxed by the statute sought to be invoked.

Appellant needlessly devotes much of his brief to the proposition that the exhibition of films is a local activity that may be taxed by the State—an activity which is now being adequately taxed under Section 2 (g) and the validity of which tax is not challenged in this case and is not before the Court. Then he returns to his original claim that appellee should be taxed under Section 2 (i), not for the once-taxed exhibition of films, but for the New York activity of leasing films (or "collecting rent" as he chooses to call it)—a claim which is repugnant to the Commerce Clause as well as to the statute involved.

Appellant's position is not clear but it would seem to be clear that the offending tax cannot validly be imposed under any position or theory.

It is respectfully submitted that appellee is not engaged in West Virginia in the business of collecting incomes from the use of personal property; that the distribution of films by appellee is interstate commerce; and that the proceeds derived by appellee from its leasing of films in interstate commerce may not validly be taxed by the State of West Virginia under the statute sought to be invoked or in any other manner.

ROBERT G. KELLY,
*Counsel.*

BROWN, JACKSON & KNIGHT,
*Of Counsel.*

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IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, individually and in his official capacity as acting Tax Commissioner for the State of West Virginia,
*Appellant,*

vs.

UNITED ARTISTS CORPORATION, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

## BRIEF AMICI CURIAE OF ATTORNEY GENERAL OF WASHINGTON et al.
## And Motion For Leave to File the Same

G. W. HAMILTON,
*Attorney General of the State of Washington,*

R. G. SHARPE,
*Assistant Attorney General of the State of Washington,*
*Amici Curiae.*

Temple of Justice, Olympia, Washington.

STATE PRINTING PLANT, OLYMPIA, WASHINGTON

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## BRIEF AMICI CURIAE OF ATTORNEY GENERAL OF WASHINGTON *et al.*

**And Motion For Leave to File the Same**

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G. W. HAMILTON,
*Attorney General of the State of Washington,*

R. G. SHARPE,
*Assistant Attorney General of the State of Washington,*

*Amici Curiae.*

Temple of Justice, Olympia, Washington.

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## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Come now G. W. Hamilton, Attorney General of the State of Washington, and R. G. Sharpe, Assistant Attorney General of the State of Washington, and move the Court for an order permitting said G. W. Hamilton and R. G. Sharpe to file the annexed brief *amici curiae* in the above entitled appeal.

This motion is based upon the records and files in

said appeal and upon the attached affidavit of R. G. Sharpe.

G. W. HAMILTON,
*Attorney General of the State of Washington,*
R. G. SHARPE,
*Assistant Attorney General of the State of Washington,*
*Amici Curiae.*

State of Washington,
County of Thurston, } ss.

R. G. Sharpe, being first duly sworn, on oath, deposes and says: That G. W. Hamilton who signed the foregoing motion, is the duly elected, qualified and acting Attorney General of the State of Washington, and affiant is the duly appointed, qualified and acting Assistant Attorney General of the State of Washington; that ever since 1933 the statutes of the State of Washington, to-wit: chapter 191, Laws of Washington of 1933, and chapter 180, Title II, Laws of Washington of 1935, have imposed and do now impose an excise upon distributors of motion picture films of the same general kind and nature as that imposed by the statutes of West Virginia, the validity of which is involved in the above appeal, and that the decision in said appeal will be determinative of the validity of the excise so imposed by the Washington statutes, and that the State of Washington is therefore directly interested in the outcome of said appeal.

This affidavit is made in support of the attached motion for leave to file a brief *amici curiae.*

R. G. SHARPE,

Subscribed and sworn to before me this 28th day of November, 1938.

JENNIE M. TATTERSALL,
Notary Public in and for the State of Washington, residing at Olympia.

# Supreme Court of the United States

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

## BRIEF AMICI CURIAE OF ATTORNEY GENERAL OF WASHINGTON et al.

### ARGUMENT

**Rental of motion picture films for exhibition in West Virginia is intrastate business subject to local taxation.**

A careful search fails to reveal any decision of this Court squarely involving the right of a state to exact an excise tax for revenue only, under the facts shown by the record here. This Court has, however, decided that as soon as motion picture films are placed upon the exhibitor's reels they enter into consumption and become commingled with the general property of the state.

An Ohio statute provided for a board of censors to which all films were required to be submitted before being publicly exhibited in the state. The act related only to films after removal from the shipping cases and placed on reels to be publicly exhibited and displayed in the state. A fee was exacted of $1 for each reel of film examined. In holding such act not to be violative of the commerce clause, the Court said in *Mutual Film Co. v. Industrial Commission*, 215 Fed. (D. C.) 138, 146:

"While the films are in use for public exhibition within a given state, they are like any other property owned and used in the state. It can make no difference that all are not consumed through use in a particular state, and that such as survive are shipped into one or more other states and there similarly used; for in each instance commerce ceases where local use commences."

In affirming the district Court's decision, the Supreme Court said in *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U. S. 230, 240:

"There must be some time when the films are subject to the law of the state, and necessarily when they are in the hands of the exchanges ready to be rented to exhibitors or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the state."

In *Eureka Productions v. Lehman*, 17 Fed. Supp. 259, 260, plaintiff sought an interlocutory injunction restraining state officials from interfering with the exhibition of a film imported from a foreign country, after refusal of such officials to grant a permit for such exhibition as provided by state law. In denying the relief sought the Court said, in part:

"* * * We think that censorship by statutory regulation in the state of New York constitutes no burden upon foreign commerce. The licensing provision

of the state statute applies equally to all films sought to be exhibited within the state. It is intended merely to regulate their local use. * * * Whether it be interstate or foreign commerce, the validity of a state statute is to be determined by its practical effect. * * * (citing cases) * * * This state regulation of a strictly local use can hardly be said to burden foreign commerce. In regulating the local exhibition of films, the state exercises its police power after the article has lost its character as an import and consquently does not invalidly interfere or conflict with the exercise of federal power. *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U. S. 230, * * *; *Fox Film Corp. v. Trumbull*, 7 F. (2d) 715 (D. C. Conn.)."

The Court then quoted excerpts from the *Mutual Film* case, including that above set out.

The order denying an interlocutory injunction was affirmed by this Court on authority (among other cases) of *Mutual Film Corp. v. Ohio Industrial Comm'n*, 236 U. S. 230, 240, 241, and *Mutual Film Corp. v. Kansas*, 236 U. S. 248, 258.

See *Eureka Productions Inc. v. Lehman*, 302 U. S. 634.

Again in *Boynton v. Fox West Coast Theatres Corp.* (C. C. A. 10th), 60 Fed. (2d) 851, 853, involving the validity of a Sunday closing law, it was said:

"It is urged that this statute, when applied to plaintiffs, contravenes the Federal Constitution, art. 1, § 8, subd. 3, because it regulates and directly burdens interstate commerce. It is well settled that a producer or manufacturer, who ships motion picture films from one state to lessees in another state to be exhibited by the lessees, is engaged in interstate commerce. *Binderup v. Pathe Exchange Inc.*, 263 U. S. 291 * * *. But, when an article that has been transported in interstate commerce has arrived at a destination and is there held for use or disposal, it then passes under the protection of

state law and becomes subject to the taxing and police power of the state." (citing numerous authorities)

A Connecticut law entitled "An act providing for the imposition of a tax on films," etc., prohibited the delivery of motion picture films for purpose of exhibition in the state without being registered and a tax paid thereon of $10 for each film of 1,000 feet or less, with 50 cents additional for each extra 100 feet. The law was attacked in *Fox Film Corp. v. Trumbull*, 7 Fed. (2d) 715, by two film distributing companies. The Fox Film Corporation, a New York distributing company, contracted with exhibitors in Connecticut through its salesmen who solicited contracts with such exhibitors. The contracts were, as here, subject to approval by the home office. Pursuant to such contracts, the films were shipped from New York either directly to the exhibitor in Connecticut or to a branch office in New Haven, which made delivery to the exhibitor. The other plaintiff, The American Feature Film Corporation, a Massachusetts distributing company with its principal place of business in Boston, conducted its business of entering into contracts and distributing films in the same way except that it had no branch office in Connecticut but shipped its films by parcel post or express directly to Connecticut exhibitors, which films were returned to the Boston office on completion of the exhibition. None of the photoplays involved were made in Connecticut. The three-judge court, after an extensive review of the authorities, held that whether regarded as a revenue measure or police regulation, the Connecticut law was not a regulation or restraint on interstate commerce as regards films shipped to lessees for exhibition, since it

operated alike on films brought into or produced in the state and only incidentally affected interstate commerce.

In *United Artists Corp. v. Taylor*, 288 N. Y. Supp. 946, 948, it was held that the fact that the transaction involving the licensing of motion picture films for exhibition originated in interstate commerce would not deprive a city of power to tax the disposition of films after arrival within the state. Said the Court:

"We agree with the determination of the comptroller that the transaction which is the subject of this appeal constituted a sale within the meaning of subdivision (e) of section 1 of Local Law No. 24 (published as No. 25, p. 165) of 1934. It constituted a transfer of the possession, in conjunction with a 'license to use' tangible personal property. We are also of opinion that even if such transactions be regarded as originating in interstate commerce (*Binderup v. Pathe Exchange, Inc.*, et al., 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308), the city is not deprived of the power to impose a tax upon the disposition of the films after arrival in this state (*Sonneborn Bros. v. Cureton*, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095; *Wiloil Corporation v. Commonwealth of Pennsylvania*, 294 U. S. 169, 55 S. Ct. 358, 79 L. Ed. 838; *Minnesota v. Blasius*, 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131)."

The owning and leasing of taxicabs and the collection of rents therefrom is held to constitute the doing of business within the meaning of the Corporation Excise Tax Act. *Lacroix v. Motor Taximeter Cab Co.*, decided in connection with *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171.

In *Commonwealth v. National Cash Register Co.*, 117 Atl. 439, 271 Pa. 406, the defendant, an Ohio corporation, had on lease in Pennsylvania a large number of cash registers, under an agreement whereby the registers were delivered to prospective purchasers who, at the expiration

of the terms of the leases, agreed to purchase the registers or to surrender them. In the event of purchase the amount deposited with the company as security was applied to the purchase price; ownership, meanwhile, remaining in the company. It was held that the agreement was a bailment and not a sale; that the situs of the property was in Pennsylvania, and represented an investment there of capital of a company "doing business" in the state; and hence, that a state capital stock tax imposed by Pennsylvania might lawfully be measured by the value of such cash registers outstanding.

Refrigerator cars used in state, but owned by foreign corporation are not exempt from *ad valorem* taxes by reason of such use, and the state where used may impose its fair share of tax.

*Jonnson Oil Co. v. Oklahoma*, 290 U. S. 158 and cases cited.

**Foreign corporation qualification cases.**

In *Ligon v. Alexander Film Co.* (Tex.), 55 S. W. (2d) 1030 (Cert. denied, 289 U. S. 760), the facts were briefly these: a Colorado corporation conducted a studio in Colorado for the manufacture of motion picture films containing advertising matter relating to the business of its customers. Two Texas theatres contracted with the film company to exhibit films advertising the business of local merchants under contract wth the film company. These advertising contracts were not binding until approved by the film company in Colorado. By these contracts the local merchant subscribed for film advertising service consisting of advertising films produced in Colorado and shipped to the two Texas theatres and by them displayed.

The Court held that in carrying on such motion picture advertising service the film company was doing an intrastate business in Texas preventing its from suing in the Texas courts without complying with the Texas foreign corporations license laws. Said the Court (p. 1032):

"The circumstance that interstate commerce was involved in the manufacture and shipment of the films does not alter the intrastate character of the public exhibition of the advertising matter contained in the films."

Here the license agreement requires the exhibition of the exhibitor's film (Contract, par. 6, R. 19) and provides for the exaction of damages for failure to exhibit. (Contract, par. 3-b, R. 18.) There seems little, if any difference in principle, therefore, between the *Ligon* case, and that here involved.

In *Rex Beach Pictures Co. v. Garson Prod. Co.*, 209 Mich. 692, 177 N. W. 254, the plaintiff, a Maine corporation, as the owner of a motion picture known as "The Barrier," made a contract with a New York corporation for distribution of the picture. The New York corporation, as agent for, and with the express consent of, the Maine corporation, employed the Garson Production Company, a Michigan corporation, as the Michigan agent for the picture. The sole purpose of this agreement, according to the Michigan supreme court, was to create an agency or means whereby plaintiff, a foreign corporation, "in the conduct of its ordinary business, was to derive a continued revenue from the exhibition of its motion picture (of which it at all times remained the absolute owner) to audiences assembled in different Michigan theatres, and from revenues so derived to receive as its share of the income produced * * * 80% of the gross

receipts, income and revenue." The court held that the Maine corporation was carrying on business in Michigan and hence was required to comply with the Michigan laws licensing foreign corporations to do business within the state.

*Short Films Syndicate Co. v. Standard Film Service Co.*, 39 Oh. App. 79, 176 N. E. 893, was an action to recover from an Ohio corporation certain amounts alleged to be due plaintiff, a New York corporation not licensed to do business in Ohio, under contracts of lease of motion picture films. The court held that the foreign corporation without a certificate was precluded from recovering in Ohio on contracts leasing films for subleasing to Ohio theatres, since such a transaction constituted "doing business in the state."

A foreign corporation has been held to be transacting business in a state requiring a license therefor where it has shipped machines into the state on long term leases with reservation of yearly or other rentals; there thus being a continuance of dealing by it with property in the state after interstate commerce had wholly ceased.

*Davis v. United Shoe Repairing Mach. Co.* (Tex. Civ. App.), 92 S. W. (2d) 1107;

*United Shoe Machinery Co. v. Ramlose*, 210 Mo. 631, 109 S. W. 567;

*State ex rel. Hays v. Robertson*, 271 Mo. 475, 196 S. W. 1132;

We will later (*post*, pp. 25-6) quote at some length from the case last cited.

**Rental of film taxable locally for same reason that film itself is subject to local ad valorem taxation.**

Since the use of the film for rental purposes is merely one of the rights and powers incident to its ownership, such use is just as truly subject to local taxation as is the film itself a legitimate subject of local property taxation.

The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constitutent elements.

*Bromley v. McCaughn*, 280 U. S. 124, 136-138;
*Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 267-8.

"The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582.

**The Binderup Case.**

The case upon which appellee chiefly relies is *Binderup v. Pathe Exchange*, 263 U. S. 291. That was an action for triple damages for violation of the Federal Anti-Trust Act of 1890, brought against various distributors of motion picture films located in New York with branch agencies in Omaha, Nebraska. The methods of operation were, so far as the facts revealed in the opinion shows, in many ways similar to those followed by appellee here. The following language was used in connection with the court's conclusion that the film distributors had combined and conspired in restraint of trade and commerce among the several states in violation of the Anti-Trust Act, (263 U. S. 309-311):

"The film contracts were between residents of different states and contemplated the leasing by one to the other of a commodity manufactured in one State and transported and to be transported to and used in another. The business of the distributors of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one State, finding customers for it in other States, making contracts of lease with them, and transporting the commodity leased from the State of manufacture into the States of the lessees. If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination."

It is to be particularly noted that the plaintiff, Binderup, "was in the business of selecting and distributing to a circuit of moving picture theaters, films and advertising matter accompanying them, under agreements with the various operators, some twenty or more in number, in various parts of the State" of Nebraska. (263 U. S. 302). Presumably, then, when films were delivered to Binderup by the defendant distributors, the same would be exhibited by him at these twenty or more theatres until he was through with them and they were returned to the distributors. Hence, the only material inquiry so far as the application of the Anti-Trust Act was concerned, was whether the transportation of the films to Binderup himself constituted interstate commerce. The defendant contended that the films came to rest at the local agency in Nebraska, and hence that the

shipment to Binderup was non-interstate, since the delivery was made by the local agency to Binderup in Nebraska. The plaintiff contended, on the other hand, that the detention, if any, of the film at the local agency in Omaha, did not put an end to the interstate character of the transaction—the transportation of the film from the New York office to Binderup in Nebraska, and with this contention, this Court agreed.

Obviously the Court did not decide, and had no occasion to decide, whether Binderup's actual exhibition of the films was a tax-exempt interstate activity.

We think the proper view with respect to the bearing of the *Binderup* case on the problem presented here, was taken by the dissenting justices in *Paramount Pictures Dist. Co. v. Henneford*, 184 Wash. 376, from whose opinion we quote the following (pp. 385-6):

"Notwithstanding the eminent authority upon which the majority rests its decision, I am convinced that it has misconceived the situation, has failed to see what operation is sought to be taxed, and has misapplied the doctrine of *Binderup v. Pathe Exchange*, 263 U. S. 291, 44 S. Ct. 96.

"For present purposes, we should disregard the fact that the films are produced outside of this state and are brought here through an interstate operation. All of that is wholly beside the present question.

"When and after the films arrive in this state, they are exhibited in local theaters for the joint benefit of the local exhibitors and the film owner. The proceeds of those wholly local exhibitions, which are paid to and received by the film owner, are the sole basis for the tax. As I see it, such proceeds are wholly derived from the local exhibitions.

"The process of exhibiting the films in all of the local theaters consumes wholly the commercial value of such films within this state. In other words, the films come to this state new, with their value intact, and are ex-

hibited from place to place within the state until their value within the state is wholly consumed and no commercial value within the state remains in them. They are thus, for all practical purposes, as wholly consumed within the state as would be a sack of flour shipped into the state, made into bread, and the bread then eaten. Nothing would remain of the flour, and nothing remains of the commercial value of the films in this state, save as it has been converted into money by the operation, and that money so earned within the state is wholly a local product and is the sole basis of the tax.

"No such question involving earnings through local exhibitions was involved in the *Binderup* case, *supra*, and not even remotely did the court undertake to decide such an issue. On the contrary, the court clearly pointed out that no such question was involved, saying:

" 'The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause. *Stafford v. Wallace*, 258 U. S. 495, 525-527; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245.'

* * * * * * * *

"In a case such as this, involving the purely local exhibition of films, the right of the soverign state to tax is so clear that no authority need be cited."

**Inapplicability of Conspiracy cases in determining limitations of State's taxing power.**

In considering the application of the *Binderup* case it is most important to bear in mind the observation repeatedly made by this Court that decisions holding activities or property subject to state taxation are not authority for the contention that such activities are immune from federal regulation under the Commerce Clause. May we repeat what was said in this connection in the *Binderup* case (quoted by dissenting justices in *Paramount Pictures Dist. Co. v. Henneford*, 184 Wash. 376, 386):

"The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. *It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause.* *Stafford v. Wallace*, 258 U. S. 495, 525-527; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245." *Binderup v. Pathe Exchange*, 263 U. S. 291, 311. (emphasis supplied)

And see also: *Swift & Co. v. U. S.*, 196 U. S. 375, 400.

The reason for the rule is apparent. Under certain circumstances, Congress may regulate intrastate commerce. Hence, authorities to the effect that certain activities are intrastate commerce, and hence subject to state taxation, are "'of little value" for the purpose of defining the limitations of valid Federal regulation under the Commerce Clause.

Thus, Congress has the unquestioned right to regulate intrastate commerce when the situation becomes such, by reason of the interblending of the interstate and intrastate operations, that adequate regulation of the particular commerce between the states cannot be maintained without regulating *intrastate* transactions of like character.

This rule is elaborately and convincingly explained in the well considered case of *Stafford v. Wallace*, 258 U. S. 495, 517 *et seq.* where the authorities are cited and reviewed. More recent cases affirming the same rule are: *Georgia Public Service Com. v. U. S.*, 283 U. S. 765; *Alabama v. U. S.*, 283 U. S. 776, and *U. S. v. Louisiana*, 290 U. S. 70.

It must necessaarily follow, of course, that since activities which are intrastate and therefore subject to

local taxation, may also be subject to federal regulation, conspiracy cases are of little if any value as authorities as to the limitation of state taxing power.

Indeed the Court has recognized this to be true in at least two comparatively recent cases:

*Wiloil Corp. v. Pennsylvania* 294 U. S. 169;
*Minnesota v. Blasius,* 290 U. S. 1.

Said the Court in the *Wiloil* case, a suit involving a state's right to exact an excise on gasoline delivered from without the state pursuant to a contract made within the taxing state:

"We need not consider whether deliveries to purchasers ended the interstate commerce involved, including all incidents that in other connections might constitute an essential part of that which is covered by the commerce clause. Cf. *Fed. Trade Comm'n v. Pacific Paper Assn.*, 273 U. S. 52, 63. Upon the principle applied here recently in *Minnesota v. Blasius,* 290 U. S. 1, the liquid fuels were taxable in Pennsylvania." (294 U. S. 175)

In the *Blasius* case, the Court, although finding that the dealings there involved in connection with livestock shipped to stockyards from points within and without the state, were so related to a current of interstate commerce as to be subject to federal regulation, yet held that while held in such stockyards such cattle were subject to local taxation. Quoting from the opinion (290 U. S. 8):

"But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a state may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the state. The distinction was recognized in *Stafford v. Wallace, supra,* pp. 525, 526 (258 U. S. 495), where the

court cited, as an illustration, the case of *Bacon v. Illinois*, 227 U. S. 504, in which such a non-discriminatory property tax was sustained."

And it is to be noted that in the *Wiloil* case, this same principle was held applicable to both excises and property taxes. To quote:

"And as that rule applies whether the burden falls directly or indirectly * * * it is not material whether the tax is upon the sale and delivery or upon the property." *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169, 175.

As already noted, in the *Binderup* case the Court was merely considering whether the interstate activities of the film companies were sufficient to bring them within the operation of the Sherman Anti-Trust Act. The Court did not undertake, and was not called upon to determine when the films ceased to be articles of interstate commerce. It simply held they were moving in interstate commerce up to the time of their receipt by Binderup, who was, himself, a distributor.

In *U. S. v. Interstate Circuit*, 20 Fed. Supp. 868, 873, the Court recognized that while the exhibition contract was interstate, "the exhibition, itself, of the moving picture is state commerce, and beyond the finger of regulation as interstate commerce."

**Rental agreements not analogous to interstate sales.**

It will be doubtlessly contended that the distributor's activities in renting films are no less interstate commerce than if the films were sold outright to the exhibitors. Our answer is that an interstate sale is interstate commerce and a tax thereon is a direct tax on interstate commerce forbidden by the commerce clause. But after

interstate transportation has ended, a non-discrimatory local tax either on the property itself or upon its use is neither a tax nor an unlawful burden on interstate commerce.

*Henneford v. Silas Mason Co.*, 300 U. S. 577.

Where property has reached the destination of its first shipment, and is held there, not in necessary delay or accommodation to the means of transportation, but for the business purposes and profit of the owner, the interstate character of such property ceases, and its taxation by local authorities does not thereafter amount to a regulation or direct burdening of interstate commerce.

*Pittsburgh & So. Coal Co. v. Bates*, 156 U. S. 577;
*Diamond Match Co. v. Ontonagon*, 188 U. S. 82;
*American Steel & Wire Co. v. Speed*, 192 U. S. 500;
*General Oil Co. v. Crain*, 209 U. S. 211;
*Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665;
*Minnesota v. Blasius*, 290 U. S. 1;
*Edelman v. Boeing Air Transport*, 289 U. S.249;
*N. C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 266-8.

It is of course apparent that the performance of the rental agreement not only consumes the film itself, but exhausts the earning power of any other print of the original negative. Thus, during the entire useful existence of these films, the distributor directly benefits by the police and fire protection afforded by the states where exhibited. The distributor's entire income depends upon the state police protection thus afforded. Moreover, the state protects not only the distributor's films, but its income therefrom as well. It is fair to assume that the larger part of the distributor's revenues are from percentage contracts. Percentage rentals are not paid until

the end of the engagement or at least until the end of each day's exhibitions, and meantime are subject to state police and fire protection.

When the various states wherein the distributor operates are thus charged with the duty and expense of policing its property and activities, it cannot, we submit, be heard to deny the right of these states to exact of such activities their fair share of the expense necessary to the enjoyment of such protection.

Our position is well expressed by the Missouri court in *State ex rel. Hays v. Robertson*, 271 Mo. 475, 196 S. W. 1132, 1135-6, from which we quote:

"Interstate commerce, as to the particular phase confronting us, connotes trafficking transactions between citizens of different states, whereby the title of the seller in the commodity sold is transferred to the buyer, or agreed so to be upon the contingency of payment of the purchase price by installments or otherwise (*Kansas City v. McDonald*, 175 S. W. 917), not one wherein the property of the quasi seller is moved bodily into this state and leased for a long term of years for an exorbitant annual rental and to be returned to such seller at the end of the rental period.

"* * * In interstate commerce the delivery of the commodity to the purchasing citizen of another state may be either in the domicile of the vendor or of that of the vendee; it may be for cash, or on time, by giving credit and taking back security, by payment in full or by installments, but, if the title to the commodity does not pass, and is not to pass, certainly the business is not traffic; it is not buying and selling. It is but the bringing of the property of the foreign corporation into this state, and so dealing therewith after it is in the state as to make of such property a source of income to the foreign corporation. In short, it is a continued dealing by the foreign company with the property in this state after interstate commerce has wholly ceased its dealings therewith. If such acts do not constitute transacting business in this state, it is difficult to conceive what would be necessary

in order for a foreign corporation to transact business here. Nor does the fact that a studied effort to give to the transaction a false color of interstate commerce in any way change this view."

**That rental agreement not made in taxing state, immaterial.**

It will be contended that the distributor's use of these films for rental purposes are not taxable locally either because the rental agreements must be approved by the home office or because of license agreements made with other exhibitors.

But local activities, we answer, cannot be thus transformed by contract into interstate business.

"It is not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause."

*Browning v. City of Waycross*, 233 U. S. 16, 23;
*Superior Oil Co. v. Mississippi*, 280 U. S. 390, 394-5;
*Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 22;
*Western Live Stock v. Bureau of Revenue*, 303 U. S. 250.

Where the contract is made is wholly immaterial. *Pacific Rys Advertising Co. v. Conrad*, 168 Cal. 91, 141 Pac. 916-7; *Packer Corp. v. Utah*, 285 U. S. 105.

Contracts are not articles of commerce. They are not subjects of trade and barter. They are not in and of themselves interstate transactions simply because the negotiations are interstate. *Paul v. Virginia*, 8 Wall. 168; *Hooper v. California*, 155 U. S. 648; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389; *Nutting v. Massachusetts*, 183 U. S. 553.

Said the Court in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 253:

"That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of congressional action, unless the performance is within its protection, is a proposition no longer open to question." (citing authorities.)

**Effect of West Virginia's excise, if any, on interstate commerce, is remote, indirect and incidental, and hence it does not offend Commerce Clause.**

A non-discrimatory state tax which only indirectly or remotely burdens interstate commerce is not obnoxious to the commerce clause.

*Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 294;

*Western Cartridge Co. v. Emmerson*, 281 U. S. 511, 514;

*Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 267-68;

*Southern Gas Corp. v. Alabama*, 301 U. S. 148, 157.

The criterion frequently applied in recent cases to determine when a state tax measured by gross receipts constitutes a direct and hence unconstitutional burden, and when merely indirect and incidental, and hence, a permissible burden on interstate commerce, is that of potential multiple taxation. Said the Court in the recent case of *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 255-6:

"The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * * The multiplication of state taxes measured by the gross receipts from inter-

state transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

And to the same effect see: *Coverdale v. Pipe Line Co.*, 303 U. S. 604, 612, and *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 311-314.

It is to be noted that in the *Coverdale* and *Western Live Stock* cases the Court's analyses demonstrated that the offending excises were not taxes which in form or substance could be repeated by other states in such manner as to lay an added burden on interstate commerce, and the excises were sustained.

In the *Storen* case, on the other hand, it was found that the tax was of such a character that, if valid, it could be laid by the other states affected by the transactions, and hence the tax was condemned as offensive to the Commerce Clause.

Applying this test to the tax here involved, it is at once apparent that no state other than West Virginia could impose an excise measured by the rentals paid appellee by West Virginia exhibitors. Obviously, any tax thus sought to be imposed, would be extra-territorial in its operation and clearly violative of the due process clause.

We believe that the following language of the Court may well be applied here:

"But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not

be burdened with cumulative exactions which are not similarly laid on local business." *Western Live Stock v. Bureau*, 303 U. S. 250, 358.

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For the reasons urged, we respectfully submit that the decree of the statutory three-judge court should be reversed, and the suit dismissed.

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*Amici Curiae.*

# SUPREME COURT OF THE UNITED STATES.

No. 161.—October Term, 1938.

Ernest K. James, Individually and in his official capacity as Tax Commissioner for the State of West Virginia, Appellant,
*vs.*
United Artists Corporation.

Appeal from the District Court of the United States for the Southern District of West Virginia.

[January 3, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

This appeal requires consideration of but a single question: whether appellee is subject to the provisions of a statute of West Virginia which lays a tax, measured by gross receipts, "Upon every person [including corporations] engaging . . . within this state in the business of collecting incomes from the use of real or personal property. . . ."

Appellee, a Delaware corporation, having an office and its principal place of business in New York City, brought the present suit in the District Court for southern West Virginia against appellant, a West Virginia tax official, to restrain collection of a tax imposed by Article 13 of Chapter 11 of the West Virginia Code, as amended March 9, 1935, by c. 86, West Virginia Laws of 1935, on the ground that the appellee was not, by the terms of the statute, subject to the tax, and that the tax was an unconstitutional burden on interstate commerce.[1]

The district court, three judges sitting, adopted as its findings the facts as stipulated. It found that the amount of the tax exceeded $3,000 and that such judicial remedy as there was under West Virginia law for recovery of the tax, if paid, was not en-

[1] The suit was begun before the enactment on August 21, 1937, of the amendment to § 24 of the Judicial Code, 50 Stat. 738, providing that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." Section 2 of the Act excludes from its operation suits begun in the district courts before its enactment.

forceable at law in the federal courts, and that by reason of penalties for nonpayment, some of which were cumulative, appellee was without adequate legal remedy. The court concluded that appellee was not doing business in West Virginia or engaged there in the business of collecting income from the use of personal property, within the meaning of the applicable taxing act, and that the attempted tax was an unconstitutional burden on interstate commerce, and decreed that collection of the tax be permanently enjoined. 23 F. Supp. 353. The case comes here on appeal under § 266 of the Judicial Code, 28 U. S. C. § 380.

Section 2 of Article 13, c. 11, of the West Virginia Code, as amended, lays annual privilege taxes upon various businesses and activities carried on within the state. Section 2(g) imposes a tax of one-half of one per cent. of the gross income derived from the business of operating a theatre or moving picture show. Section 2(h) taxes the gross receipts of every person engaging within the state in any business not otherwise specifically taxed, and § 2(i) levies upon "every person engaging . . . within this state in the business of collecting incomes from the use of real or personal property" a tax of one per cent. "of the gross income of any such activity".

Appellee is engaged in the business of distributing motion picture films for exhibition in theatres in various states, including West Virginia. It maintains branch offices in Ohio, Pennsylvania, and the District of Columbia, but has no office or place of business in West Virginia, and has no agents or employees in the state other than a traveling representative who visits the state to solicit from theatre managers or owners contracts for the exhibition there of films to be supplied by appellee. Appellee owns no property in West Virginia other than the films sent there temporarily for exhibition and afterward returned to it at points without the state.

In the course of its business appellee from time to time makes public announcements of its offering of films. Theatre owners or managers in West Virginia sign written applications in the form of offers for license contracts permitting the exhibition in West Virginia of such films as they desire to show there. The signed applications are transmitted to appellee's New York office, where it accepts or rejects them. When they are accepted, appellee signs a written acceptance attached to the application and returns the

executed contract to the exhibitor. The subsequent course of business between appellee and the West Virginia exhibitor conforms to the terms of the contract. It calls for the delivery of the films by shipment from any of appellee's exchanges to the exhibitor in West Virginia, and provides for exhibition of the films for a specified period, for which the exhibitor undertakes to pay a fixed sum or a percentage of the receipts from exhibition, and for the return of the films by the exhibitor after they are shown, by shipping them to another exhibitor or to one of the appellee's exchanges, as appellee may direct.

When the license is upon a percentage basis, the exhibitor undertakes to segregate appellee's percentage of the box office receipts and to hold it "in trust" and pay it over to the appellee daily. But the contract provides that "Any and all payments to be made hereunder shall be payable to the Distributor at the city in which is located the Exchange from which the Exhibitor is served," and all payments due appellee from West Virginia exhibitors are sent by them to appellee at points without the state.

Upon the argument the state conceded that the exhibitors of appellee's films in West Virginia are subject to and pay the tax imposed on operators of moving picture houses by § 2(g) and that the tax is measured by the entire gross receipts from exhibiting the films, ascertained without deducting the percentage payable to appellee. The Attorney General of the state disclaimed any contention that appellee was taxable under § 2(h), see *Pennywitt* v. *Blue, State Tax Commissioner,* 73 W. Va. 718, or under any provisions of the statute other than those of 2(i) laying a gross receipts tax on every person engaging within the state in the business of collecting incomes from property.

The Supreme Court of West Virginia appears not to have construed this section, and we are without the benefit of any legislative history of the statute indicating that it has any purpose or meaning other than that suggested by its words. We are not here concerned with the question whether a state, by a statute appropriately framed, may lay a tax on income derived from sources within it, or whether the solicitation of the contracts may be taxed. No such taxation is attempted by § 2(i). The taxing provisions of § 2 are restricted in their application to various enumerated classes of activities within the state, one of which, specified in § 2(f), is

that of engaging there in the business of collecting incomes. The conduct of such a business or activity by appellee requires its presence there, or that of its agent, and the collection of income within the state by the one or the other. As it is stipulated and found that appellee carries on no business within the state, except such as is involved in solicitation of the contracts, and has no collection agent there, and as the exhibitors there are bound to and do pay all sums due under their contracts to appellee at points outside the state, we can find no basis for saying that it is engaged in collecting income within the state, either as a business or otherwise.

The contract requirement that the exhibitor is to set apart the appellee's percentage of the gross receipts "in trust" is a familiar device for securing payment to the appellee in the event of the exhibitor's financial embarrassment. But it does not make the exhibitor appellee's agent, nor does it dispense in law, more than it has in fact, with the performance of the former's obligation to make all payments to appellee without the state. The emphasis placed by § 2 and its various subsections on the carrying on of business or other specified activities within the state as the condition of laying the tax, and the fact that the exhibitors' receipts are taxed in their hands under § 2 (g), lead to the conclusion that there was no legislative purpose in cases like the present to tax gross receipts apart from the business or activity of collecting them, carried on within the state. We cannot say that the court below was wrong in that conclusion.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*